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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF HAWTHORNE, et al.,

Petitioners,

vs.

EARL WRIGHT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a federal appellate court judge, sitting by special designation as a district court judge solely to hear matters relating to provisions of a consent decree, have discretion to grant leave to file a supplemental complaint in the action in which the consent decree was entered where the legal and factual issues in the supplemental complaint are totally unrelated to those raised in the underlying proceeding?

2. Does a district court have discretion to reopen the trial proceedings *sua sponte* for the taking of additional evidence under circumstances where the party who will benefit from the additional evidence (i) had ample opportunity to present all relevent evidence at the trial, (ii) offered no reason why further evidence could not have been presented at the time of trial, and (iii) deliberately chose *not* to present additional evidence at trial?

3. In an action brought under Title VIII, 42 U.S.C. §3601 *et seq.* and California Government Code §65008 alleging that the petitioners denied approval of two proposed multi-family developments based on racial discrimination and discrimination against low income persons, does the district court have discretion to allow respondents to maintain the action where there was absolutely no evidence that respondents, added as plaintiffs to the action after the matter had been submitted for decision because the original plaintiffs had no standing, had been excluded from the City of Hawthorne?

4. Does the district court have discretion to admit the results of a survey into evidence where the only witness whose testimony was offered to lay the necessary evidentiary foundation for such hearsay evidence

admitted that he was not the director of the survey and was not present while the survey was being conducted?

LIST OF PARTIES

The parties to the proceedings below were petitioners The City of Hawthorne, Hawthorne City Council, Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker, and David M. York and respondents Earl Wright, Rose Kimball, and Pablo Zapeta. Interveners on the supplemental complaint in the proceedings below were the California Department of Transportation, the California Department of Housing and Community Development and Goldrich & Kest, Inc.[1]

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[1] The original plaintiffs in the underlying action were Ralph W. Keith, Esther May Keith, Harold E. Grady, Edith W. Grady, JamesB. Gillespie, Helen M. Gillespie, National Association for the Advancement of Colored people, the Sierra Club, Environment Defense Fund, Inc. and Freeway Fighters. The original complaint was amended in April, 1972, to add the City of Hawthorne as a plaintiff.

Named as defendants in the original and amended complaint were the Secretary of the U.S. Department of Transportation, the Region 7 Administrator of the Federal Highway Administration, the Federal Highway Administration, the U.S. Department of Transportation, the Division Engineer of the Federal Highway Administration and U.S. Department of Transportation, the California Highway Commission, the California Department of Public Works, the Director of the California Department of Public Works, and the California State Highway Engineer.

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CITY OF HAWTHORNE, et al.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners The City of Hawthorne, Hawthorne City Council, Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker and David M. York (hereinafter referred to collectively as "Hawthorne") respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 16, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 858 F.2d 467, and is reprinted in the appendix hereto, p. B1, *infra.*

The memorandum decision of the United States District Court for the Central District of California (Pregerson, CJ., presiding by special designation) is reported at 618 F.Supp. 1132, and is reprinted in the appendix hereto, p. A1, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1343 subds. (3) and (4), the respondents brought this suit in the Central District of California. On September 3, 1985, the Central District granted judgment in favor of respondents. (*See,* p. A3, *infra.*)

On petitioners' appeal, the Ninth Circuit on September 19, 1988, entered a judgment and an opinion upholding the Central District's order. (*See,* p. B2, *infra.*)

On January 24, 1989, the Ninth Circuit denied petitioners' petition for rehearing and request for hearing *en banc.* A copy of the Ninth Circuit's order denying the petition for rehearing is reprinted in the appendix hereto, p. C1, *infra.*

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

42 U.S.C. § 3604. Discrimination in sale or rental of housing.

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful —

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person becaue of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services of facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin."

California Government Code Section 65008. Discrimination; prohibition.

"(a) Any action pursuant to this title by any city, county, or city and county in this state which denies

to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state because of religious or ethnic reasons is null and void.

(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, lawful occupation, or age of the owners or intended occupants or the residential development or emergency shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income.

For the purposes of this section, 'persons and families of middle income' means persons and families whose income does not exceed 150 percent of the median income for the county in which the persons or families reside.

(d) No city, county, or city and county may impose different requirements on a residential development or emergency shelter which is subsidized, financed, insured, or otherwise assisted by the federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, than those imposed on nonassisted developments, except as provided in subdivision (e).

(e) Nothing in this title shall be construed to prohibit a city, county, or city and county from extending preferential treatment to residential developments or emergency shelters assisted by the federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, or other residential developments or emergency shelters intended for occupancy by persons and families of low and moderate incomes, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income. This preferential treatment may include, but need not be limited to, reduction or waiver of fees or changes in architectural requirements, site development and property line requirements, building setback requirements, or vehicle parking requirements which reduce development costs of these developments.

(f) 'Residential development,' as used in this section, means a single family residence or a multifamily residence.

(g) This section shall apply to chartered cities.

The Legislature finds and declares that discriminatory practices which inhibit the development of housing for persons and families of low, moderate, and middle income, or emergency shelters for the homeless, are a matter of statewide concern."

Federal Rules of Civil Procedure, Rule 15(d) Supplemental Pleadings.

"Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or

defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

STATEMENT OF THE CASE

In February, 1972, a complaint for injunctive and declaratory relief was filed by the original parties plaintiff against certain federal and state officials alleging that said defendants had violated federal and state environmental laws, federal statutes relating to relocation assistance, and the U.S. Constitution in connection with the construction of the Century Freeway. The case was assigned to then District Judge Harry Pregerson. Judge Pregerson was appointed as a Judge of the Ninth Circuit Court of Appeals in 1979, but has continued to preside over this matter by special designation.

On September 22, 1981, the parties entered into a Consent Decree, approved by the Court ("Consent Decree"), which imposed obligations *on the state and federal defendants* to, among other things, provide replacement housing for persons to be displaced by construction of the Century Freeway as required under federal law. Pursuant to the terms of the Consent Decree, Circuit Judge Pregerson, retained jurisdiction of the matter until the Judgment of Dismissal is entered in the action.

In 1984 and 1985, development applications were filed with the City of Hawthorne for approval to construct two multi-family developments in the City of Hawthorne in areas *not* zoned for residential development. The two developments were to be funded by the State of California as part of the Century Freeway housing replenishment program. After the state mandated public hearings, the Hawthorne City Council made findings of fact demonstrating the detrimental effect the develop-

ments would have on the City of Hawthorne and its residents and, based on those findings, denied approval of the two developments.

On or about February 7, 1985, the original parties plaintiff, (hereinafter referred to as "plaintiffs") filed a motion for leave to file a supplemental complaint against Hawthorne and an application for preliminary injunction, claiming that Hawthorne had discriminated against minority and low income persons by disapproving construction of the two developments in violation of federal and state constitutional and statutory fair housing laws. The supplemental complaint alleged six claims for relief, none of which had been alleged in the underlying action.

On April 10, 1985, Circuit Judge Pregerson, still sitting by special designation, granted plaintiffs' motion for leave to file the supplemental complaint over Hawthorne's objection. On April 17, 1985, a one-day court trial was held and the matter was taken under submission.

The day after the matter was submitted for decision, Judge Pregerson, *sua sponte*, reopened the proceeding. In addition to the submission of written evidence and legal briefs pursuant to a series of court orders, formal hearings were held on May 23, June 4, July 24, July 25, and July 30, 1985. Recognizing that they had no standing to maintain this action, plaintiffs sought leave to add additional plaintiffs (respondents herein) which was granted on July 24, 1985.

On September 3, 1985, the court issued its Order in favor of respondents and interveners and against Hawthorne on the federal and state statutory claims. (618 F.Supp. 1132 (C.D.Cal. 1985).)

REASONS FOR GRANTING THE WRIT

I.
INTRODUCTION

> "[T]his appeal is not about housing; this appeal is about the limits on official power — specifically, judicial power. In pursuit of the laudable goal of housing for freeway displaces, the district court and the majority have failed to justify the supplemental complaint in this case on any principled basis." (*Keith v. Volpe*, 858 F.2d 467, 492 (William A. Norris, Circuit Judge, dissenting) (9th Cir. 1988) Appendix, p. B60, *infra*.)

The issue of the limits of judicial power permeates the entire case now before this Court. At first glance one must question the propriety of the designation of a Circuit Court judge to hear all matters which plaintiffs in the underlying action *claim* relate to the Consent Decree *ad infinitum* under circumstances where the circuit judge takes an extrajudicial role in the implementation of the Consent Decree.[2] In the normal course, where a case involves a complex decree which impacts many parties and third parties, a district court judge has discretion to and should appoint a special master pursuant to Federal Rules of Civil Procedure Rule 53(b) to enforce the provisions of the decree and monitor the progress of the parties upon whom legal obligations have been imposed under the decrees. (*See, e.g. New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956 (2nd Cir. 1983), *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 217

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[2] Judge Pregerson not only presides over legal proceedings in court, he actively participates in formal and informal quarterly status conferences (one of which included a bus tour of the Century Freeway corridor and inspection of newly constructed replacement housing) among the various parties and agencies involved in the enforcement and implementation of the Consent Decree.

(1983); *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3rd Cir. 1979); *cert. denied*, 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed.2d 712; *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Hart v. Community School Bd. of Brooklyn*, 383 F.Supp. 699 (E.D.N.Y. 19974); *affm'd* 512 F.2d 37 (2nd Cir. 1975).)

The role of the special master in the context of court decrees was explained by the *Ruiz* court, 679 F.2d 1115, at pages 1161-1162 as follows:

> "Insofar as the special master is to report on [the defendant's] compliance with the district court's decree and to help implement the decree, he assumes one of the plaintiff's traditional roles, except that, because he is the court's agent, he can and *should* perform his duties effectively and objectively." (Emphasis added.)

By placing himself in the role of a special master, the district court judge in the instant case assumed one of the plaintiff's traditional roles, and indeed, as will be demonstrated herein, carried out that role far better than did the respondents. However, as Circuit Judge Norris apparently recognized, in an effort to further the housing objectives of the Consent Decree, the trial judge lost sight of all objectivity. The only check on the trial court's exercise of discretion was an appeal to the Ninth Circuit, the same circuit in which the trial judge is a circuit judge.[3]

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[3] Six appeals have been taken from decisions rendered in this action since the entry of the Consent Decree in 1981. In two appeals the lower court's opinion in favor of plaintiffs and respondents was affirmed (784 F.2d 1457 and the present case), two appeals were dismissed (Ninth Circuit Case Nos. 86-5956 (June 24, 1986), 87-5834 (May 6, 1988) and two appeals are still pending (Ninth Circuit Case Nos. 87-5351, 89-55305).

The trial court's personal involvement in the actual implementation of the Consent Decree and its determination to ensure that the housing objectives are not thwarted obviously tainted the trial court's ability to look objectively at issues raised in the supplemental complaint. Consequently, once the district court caught sight of the buzz words "Consent Decree," it assumed jurisdiction of the subject matter of the supplemental complaint, notwithstanding the fact that none of the factual or legal issues raised in the supplemental complaint were in any way related to the issues raised in the underlying action.

Assuming there could be some rationalization for allowing a Circuit Judge to act as a trial court judge and special master to enforce the provisions of the Consent Decree, it exceeds all bounds of law and reason to allow a Circuit Court Judge to extend his judicial power to preside over matters at the trial level which are totally unrelated to the provisions of the Consent Decree. The appearance of impropriety cannot be disputed.

In a further abuse of judicial power, after he allowed the filing of the supplemental complaint without any principled basis therefor, the trial judge allowed respondents to be added as additional plaintiffs in the case because the original plaintiffs had no standing to maintain the action, thereby underscoring the utter lack of any connection between the original complaint and the supplemental complaint.

If allowing the plaintiffs to create standing where no standing existed were not enough, after the parties had submitted the matter for decision, the district court judge then substituted his trial standards for that of respondents' counsel, chastised respondents' counsel for botching the case and proceeded to reopen the proceedings to search for additional evidence to support the respondents' case, with absolutely no showing on the part of respondents as to why additional evidence had not been produced at the time of trial. The district court even

went so far as to admit into evidence the results of a survey, which turned out to be the heart of respondents' case, without requiring respondents to lay the legally required evidentiary foundation.

Not surprisingly, the district court eventually rendered a decision in favor of respondents, without ever having to touch upon the terms of the Consent Decree. While the result of the district court's decision may have furthered the housing objectives of the Consent Decree, this result was achieved in violation of specific restraints of the Consent Decree, at the expense of the residents of the City of Hawthorne and in contravention of the law and the limits on judicial power.

The majority opinion of the Ninth Circuit, also apparently motivated by the goals of the Consent Decree, sanctioned the abuse of discretion of the district court, and upheld its decision, notwithstanding the complete lack of any legal or factual support for the decision.

Hawthorne will demonstrate herein that the lower court so far departed from the usual course of proceedings and from the legal principles established by this Court and followed by the other circuits, all in the name of Century Freeway replenishment housing, that intervention by this Court is necessary to settle the limits of judicial power and reaffirm the principles of law at issue in this case.

II.
THE NINTH CIRCUIT'S STANDARD FOR DETERMINING WHEN LEAVE MAY BE GRANTED TO FILE A SUPPLEMENTAL COMPLAINT UNDER RULE 15(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS IN CONFLICT WITH THE STANDARD ESTABLISHED BY THIS COURT AND FOLLOWED BY OTHER CIRCUITS AND IS INCONSISTENT WITH THE INTENT UNDERLYING RULE 15(d)

The allegations of the Supplemental Complaint amount to nothing more than the standard Title VIII action. Respondents alleged that Hawthorne discriminated against minorities by failing to approve the construction of two low income housing developments. Respondents' pendent state claim sought relief based upon Hawthorne's alleged discrimination against low income persons by its failure to approve the developments. The Supplemental Complaint was no different than any other Title VIII action and had no relation whatsoever to the terms and provisions of the Consent Decree. As such, it could and should have been filed in the ordinary course with the District Court clerk and assigned to one of the District Court judges for determination.

However, plaintiffs did not proceed in the ordinary course in prosecuting this action. Instead, they used the Consent Decree as a vehicle to maneuver the action before Judge Pregerson who they viewed as a sympathetic judge. Plaintiffs conduct in filing the Supplemental Complaint is the classic example of judicially disfavored "judge-shopping." By granting leave to file the Supplemental Complaint and by upholding such order, the District Court and Ninth Circuit have not only abused

their discretion but have also condoned "judge-shopping."

The Ninth Circuit, while recognizing that the supplemental action must have some relationship to the subject of the original action in order to allow the filing of the supplemental action under Rule 15(d) of the Federal Rules of Civil Procedure, ignored the standard for evaluating that relationship developed by this Court and followed by other Circuits, and fashioned a new standard which the dissenting opinion appropriately dubbed the "concern" standard. However, as Circuit Judge Norris aptly pointed out, the "concern" test,

> "is meaningless for the purpose of determining whether a sufficient nexus exists between original and supplemental pleadings to satisfy Rule 15(d)." (Appendix, p. B53, *infra.*)

While the Ninth Circuit majority opinion recognized that Rule 15(d) is a tool of judicial economy and convenience intended to promote, "as complete an adjudication of the dispute between the parties as possible" (*William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1056 (9th Cir. 1982)), it failed to demonstrate how permitting the supplemental complaint to be filed in this case would serve this purpose.

It is axiomatic that there must be some connection or nexus, in the form of either common questions or law or fact, between the two pleadings in order to satisfy the objectives of Rule 15(d). As set forth in *Randolph v. Missouri-Kansas-Texas R.R.*, 78 F.Supp. 727 (W.D.Mo. 1948):

> "A supplemental pleading . . . is designed to cover matters subsequently occuring but *pertaining to the original case. . . .*
>
> "The new matter pleaded in a permissible supplemental [complaint] *should relate to the original cause*

> *of action* and should not constitute a separate, distinct and new cause of action." (78 F.Supp. at 729; Emphasis added.)

The very cases cited in the Ninth Circuit majority opinion support Hawthorne's position that the supplemental complaint must raise the same factual or legal issues as those raised in the underlying action before a trial judge can, in the exercise of discretion, grant leave to file the supplemental complaint. (*See, William Inglis & Sons Baking Co., supra,* 688 F.2d 1014, 1057; *Griffith v. County School Board,* 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964).)

In *Griffin v. County School Board, supra,* the district court enjoined the defendant County School Board from engaging in discriminatory practices in public schools. In response to this court order, the County Board of Supervisors, together with the state legislature, took action which had the effect of closing the public schools and promoting racial segregation in private schools within the County.

This Court in *Griffin* held that the plaintiffs could properly file a supplemental complaint to enjoin the County's new actions,

> "since the legal theory upon which the supplemental complaint was based, i.e., racial discrimination, *was identical to the issue raised in the underlying action and the new transactions were part of continued persistent efforts to further racial segregation in schools.*" (377 U.S. at 226-227; Emphasis added.)

In the instant case, neither the district court nor the Ninth Circuit majority opinion were successful in identifying questions of law that are common to the original and supplemental complaints. The district court asserted that the supplemental complaint, "basically concerns an interpretation of the replenishment housing provisions of the Consent Decree." (Appendix, p. B54,

infra.) Given the fact that the Circuit Judge who presided over this matter was sitting as a district court judge solely for the purpose of hearing matters relating to the provisions of the Consent Decree, it follows that in order for him to have jurisdiction to hear the supplemental complaint, he had to reach this conclusion. However, the district court failed to point to a single issue of interpretation of the Consent Decree common to the two pleadings. The reason for this critical omission is obvious — the Consent Decree imposes no legal duty on Hawthorne or any other city to provide low income housing. To the contrary, the Consent Decree affects municipalities in California only to the extent that it ensures that all Century Freeway low income housing shall be relocated or constructed so as to be in conformity with applicable zoning and building, laws of local entities such as Hawthorne.

Thus, there is no basis for the district court's concern that a denial of leave to file the supplemental complaint could lead to, "the possibility of another court rendering an interpretation of the Consent Decree . . ." In fact, the district court conceded to this point at the trial of this case on April 17, 1985, when he stated that the respondents' supremacy clause claim, which was based on an alleged violation of the Consent Decree, was "superfluous" because the only substantive issues before the court had to do with alleged discriminatory action by Hawthorne.

The only purported relationship which the Ninth Circuit majority opinion could discern between the original and the supplemental complaints was that both "concern" replacement housing. Yet the Ninth Circuit failed to show how this "concern" is illustrated by common questions of law.

The simple fact of the matter is that the legal issues raised in the supplemental complaint have nothing to do with the legal issues raised in the original action. As

stated above the original complaint was for injunctive and declaratory relief against federal and state officials alleging violations of federal and state environmental laws, federal statutes relating to relocation assistance, and the U.S. Constitution in connection with the construction of the Century Freeway. The substantive issues raised by the supplemental complaint, namely, whether Hawthorne violated federal and state fair housing laws by its land use decisions relative to two proposed residential developments, are completely different from those raised in the original action, and do not concern an interpretation of the Consent Decree. Thus, on their face, there was absolutely no similarity in the legal issues raised in the two complaints.

Moreover, even given the facts of this case, it cannot be said that the legal issues raised in the supplemental complaint are in any way related to the legal issues raised in the original complaint. The fact that the victims of the alleged discriminatory actions of Hawthorne happened to be Century Freeway displacees is completely irrelevant to resolution of the issue of whether the City of Hawthorne engaged in discriminatory conduct. This is a fact which could have been presented to any district court as part of establishing a factual setting for the case without the need for interpretation of the Consent Decree.

The district court also failed, as did the Ninth Circuit, to point to any common issues of fact raised in the two pleadings. The district court stated that some of the allegations asserted in the supplemental complaint are similar to those raised in the underlying action, such as violations of state and federal anti-discrimination statutes. (Appendix, p. B56, *infra.*) However, there are no factual allegations that are even remotely similar in the two complaints. Significantly, the Ninth Circuit majority did not even attempt to point to any factual issues which were common to both actions.

In short, as Circuit Judge Norris stated:

> "The fact that plaintiffs are motivated by the laudable goal of affordable replacement housing for freeway displacees establishes no nexus that could possibly satisfy the requirements of Rule 15(d)." (Appendix, p. B53, *infra.*)

Two other facts illustrate the utter lack of any nexus between the supplemental complaint and the original complaint which would justify granting leave to file the supplemental complaint. First, the original plaintiffs did not have standing to maintain this action against Hawthorne, thereby necessitating the entry into the case of totally new plaintiffs pursuant to motion of respondents and order of the district court. If the two complaints had any similarity in law or fact, wouldn't it be reasonable to assume that the original plaintiffs, or at least some of them, would have standing to maintain the causes of action alleged in the supplemental complaint?

Second, all of the issues raised in the original complaint have long since been resolved by virtue of the Consent Decree. Thus, judicial economy and convenience is not advanced by granting leave to file the supplemental complaint. Since none of the issues raised in the supplemental complaint have any relation to the terms and conditions of the Consent Decree, it could not even be argued that the issues raised in the supplemental complaint could be resolved in connection with the monitoring and enforcement of the Consent Decree, which as a matter of fact did not occur in this case.

In the final analysis, it cannot be disputed that the legal and factual issues raised in the supplemental complaint are completely different from the legal and factual issues raised in the original action. Hawthorne readily admits that a district court is given broad discretion in deciding whether to permit a supplemental pleading to be filed. However, it does not follow that this discretion can be exercised in complete disregard of the standards for determining the limits on that discretion which this Court

has established and other Circuits have followed in order to further the objectives of Rule 15(d).

Hawthorne respectfully submits that review by this Court is necessary to resolve the conflict between the opinion of the Ninth Circuit in this case and the decisions of this Court and other Circuits regarding the standards to be followed in granting leave to file supplemental pleadings and to prevent the "judge-shopping" tactics which were used in this case.

III.
THE DECISION OF THE NINTH CIRCUIT TO UPHOLD THE DISTRICT COURT'S DETERMINATION THAT RESPONDENTS HAD STANDING TO MAINTAIN THIS ACTION DESPITE THE FACT THAT THERE WAS NO EVIDENCE TO SHOW THAT RESPONDENTS HAD BEEN EXCLUDED FROM LIVING IN HAWTHORNE AS A RESULT OF HAWTHORNE'S CONDUCT IS IN CONFLICT WITH THE DECISION OF THIS COURT AND OF THE FIFTH CIRCUIT ON THE SAME MATTER

In order to have standing to maintain an action under Title VIII, respondents had to prove that they have been excluded from living in Hawthorne as a result of Hawthorne's actions. (*Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975); *Jaime v. Toledo Metropolitan Housing Authority*, 758 F.2d 1286 (5th Cir. 1985).) Relying on this Court's opinion in *Warth*, and discussing the "injury-in-fact" element which is the first step in any standing analysis, the *Jaime* court stated:

> "Plaintiffs assert that they wish to have the opportunity to live outside the City of Toledo. The absence of such an 'opportunity,' however, is not an injury within the constitutional meaning of that

> word. Such an 'injury' is obviously shared by a large class of people, extending well beyond the class certified is this case. 'For purposes of standing . . . it is the exclusion itself that is of critical importance, since exclusion alone would violate the asserted rights quite apart from any objective or subjective disadvantage that may flow from it.' *Warth*, 422 U.S. at 503, n.13, 95 S.Ct. at 2207." (758 F.2d at 1096, n. 22.)

Obviously recognizing the futility in doing so, counsel for the original plaintiffs did not even attempt to establish standing on the part of the original plaintiffs. Rather, a motion was made and granted to add additional plaintiffs to the case, respondents herein, in the hopes of establishing standing. However, respondents failed at the time of trial to prove that they had been excluded from living in Hawthorne.

The Ninth Circuit majority opinion completely overlooked the "exclusion" requirement established by this Court and simply concluded that this case is not analogous to the *Jaime* case and is, therefore, controlled by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The *Arlington Heights* cases, however, does not stand for the proposition that proof of "exclusion" is not needed. To the contrary, there was substantial evidence in that case submitted to meet the "exclusion" test.

In *Arlington Heights*, the evidence established that the Village of Arlington Heights was virtually an all-white community and there was no evidence of low income housing opportunities in the Village. The individual plaintiff in *Arlington Heights* was a black man who testified that he sought and would qualify for the low income housing project for which Arlington Heights denied a zone variance. Based upon those facts, it was reasonable to conclude that as a result of the Village's actions, the plaintiff had been excluded from living in

that community and, thus, had standing to challenge the denial of the zoning variance under the Fair Housing Act.

In contract to the facts in *Arlington Heights*, Hawthorne is *not* a virtually all white city and, further, there is evidence in the instant case that there *is* affordable housing available in Hawthorne. There is also evidence that Hawthorne identified 52 alternative parcels in the City of Hawthorne on which the proposed developments could be located.

On the other hand, there is absolutely no evidence upon which to base a finding or conclusion that respondents Hillman, Wright and Zapeta have been excluded from living in Hawthorne as a result of Hawthorne's zoning actions.[4]

None of the respondents testified that they had been *excluded* from living in Hawthorne or even that they had been unable to find rental housing in Hawthorne, which they purportedly desire. Respondent Hillman testified that she had been looking for "affordable housing" for about six months, but that she has been unable to relocate in the City of Hawthorne. She did *not*, contrary to the Court's interpretation of the evidence, testify that she has been unable to find, or has been excluded from, affordable housing *in Hawthorne*. In fact, Hillman testified that she had not sought help from Hawthorne in seeking the subsidized housing which is available in the City of Hawthorne.

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[4] The district court's test of standing, as set forth in its Order, erroneously equates the requirement of "exclusion" with scarcity of housing in Hawthorne. If the court's analysis is correct, virtually every city in the nation could be charged with excluding minority and/or low income persons due to the fact that a scarcity of affordable housing is prevalent throughout the country.

Similarly, respondent Wright did *not* testify that he has been unable to find, or has been excluded from, affordable housing in Hawthorne.

Respondent Zapeta never testified that he has even attempted to find affordable housing in any location, including Hawthorne. He, too, would not object to living in another South Bay Region City.

The only evidence before the district court even remotely related to the availability of housing in Hawthorne for respondents was Hawthorne's Housing Element which states, *in generalized terms*, that lower income households have been unable to compete successfully for decent affordable housing, and the fact that there are 128 units of Century Freeway relocation housing currently available in Hawthorne. This evidence, standing alone, does not come close to proving that respondents have been excluded from Hawthorne.

It is common knowledge that low income households in *every* city today are unable to compete successfully for affordable housing. Thus, it does not necessarily follow from the general statement in Hawthorne's Housing Element that the respondents are being excluded from living in Hawthorne. Similarly, the fact that there are only 128 Century Freeway replenishment units in Hawthorne does not constitute a "distinct and palpable injury" to respondents. There is no evidence in the record to establish that they cannot relocate to other non-Century Freeway related affordable housing available in Hawthorne.

The evidence before this Court, at most, establishes that the respondents desire affordable housing in the South Bay Region and would rent an apartment in either of the proposed developments. The law is clear, however, that desirability is simply not enought to confer standing under the Fair Housing Act. (*Jaime v. Toledo Metropolitan Housing Authority, supra*, 758 F.2d 1086.)

For the reasons set forth above, respondents failed to establish standing to maintain their claims under the Fair Housing Act and judgment should be reversed.[5]

IV.
BY UPHOLDING THE DECISION OF THE TRIAL COURT TO REOPEN THE PROCEEDINGS FOR FURTHER EVIDENCE UNDER CIRCUMSTANCES WHERE PLAINTIFFS WERE GIVEN AMPLE OPPORTUNITY TO PRESENT SUCH EVIDENCE AND DELIBERATELY CHOSE NOT TO DO SO, THE NINTH CIRCUIT SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The majority opinion mischaracterizes the factual background surrounding the reopening of the proceedings. The District Court did *not* in May, 1985, reopen the proceedings simply because, "[the judge] felt he needed more recent objective data in order to make an informed decision."

The District Court commenced its "prospecting quest for other evidence possibly to add to the record" (*See, Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966)) *the day after* the matter was submitted for decision by issuing a series of minute orders to all parties seeking additional information, and continued its probing for

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[5] Under the doctrine enunciated by this Court in *Erie Railroad v. Tompkins*, (1938) 304 U.S. 64, 58 S.Ct. 817, federal standards apply to questions of standing to maintain pendent state claims. Therefore, respondents failed to establish standing to maintain their state law claim.

evidence and prodding of respondents to produce this evidence for approximately three months.

It was only after respondents failed to submit this additional information in a legally admissible form that the District Court found it necessary to *formally* reopen the proceedings and hold the May 23, 1985, hearing. At that hearing, and from that point, the district court, utterly dissatisfied with the way in which respondents' counsel were handling the case, took it upon itself to frame crucial factual issues which the respondents had not yet addressed and suggest to respondents' counsel how and where to gather evidence to address those issues.

The respondents and intervenors did provide the additional information the district court had requested from existing records and files. However, the district court's inquiry did not stop there. It found that response unsatisfactory and asked respondents and intervenors for even more information. At that point, respondents and intervenors decided to follow the district court's suggestion and conduct a survey of freeway corridor residents.

The district court was not seeking more current objective data — it was permitting respondents to fill in the gaping evidentiary holes in their case with evidence which would meet the *district court's* trial standards. Such conduct is an abuse of discretion. In *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966), the court held:

> "*It is not for a court to* [*reopen proceedings for further evidence*] *merely to have the record meet its own trial standards and thereby make its task of disposition less onerous and more gratifying.* There are but few cases in which a judge working with a trial record does not see some way in which his task of disposition could have been made easier. And above this, *from the very nature of the judicial role, it is not given to a judge to engage in a prospecting quest for other evidence*

possibly to add to a record, ... Thus, such evidence as a judge may properly seek to have added to a record on his own motion should appear both to be important as a matter of preventing injustice and to be reasonably available." (Emphasis added.)

Similarly as stated by the court in *Pickett v. Travelers Indem. Co.*, 283 F.2d 835 (7th Cir. 1960), at page 837:

"A Federal Trial Judge has both the power and duty to guide the conduct of a trial in an orderly manner to the end that justice may be done and the truth may be elicited. [Citation.] *The judge has a wide discretion in the fulfillment of that function bounded only by the requirement that he does not become an advocate for one of the contesting parties.*" (Emphasis added.)

A trial should not be reopened for further evidence where the plaintiffs have failed to show diligence or justification for their failure to discover and present such evidence at the time of trial. (*Locklin v. Switzer Bros., Inc.*, 299 F.2d 160 (9th Cir. 1961), *cert. denied*, 369 U.S. 861, 82 S.Ct. 950, 8 L.Ed.2d 18.)

There is nothing in the record to show that respondents could not *and did not*, with due diligence, discover and present all the evidence they intended to rely upon at the trial on April 17, 1985. In fact, the record shows that time and time again respondents advised the court that they believed the evidence which they had presented at trial was sufficient to support their case. The district court, however, chose to make such tactical decisions itself, thereby becoming an advocate for plaintiffs. Such conduct constitutes an abuse of discretion which is more than sufficient grounds for reversal.

V.
THE DECISION OF THE NINTH CIRCUIT TO UPHOLD THE ADMISSIBILITY OF THE RESULTS OF A SURVEY WITHOUT THE MINIMUM FOUNDATIONAL TESTIMONY OF THE SURVEY DIRECTOR IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON THE SAME MATTER

After the case was reopened, the respondents' entire case rested on the results of a survey conducted of persons residing in the Century Freeway corridor which is proposed through Hawthorne. Respondents relied upon the testimony of Dr. James H. Johnson to lay the evidentiary foundation for the results of the survey which were summarized in their Exhibit 44.

Johnson admitted in his testimony that he was *not* the director of the survey, that he was *not* present during the conduct of the survey and that he knew *nothing* about the background, experience or competency of any of the interviewers. Dr. Johnson testified that, in fact, Dr. Stephen Cole and his wife, Ann Cole, directed and supervised the survey which was conducted by telephone from New York. Neither Dr. Cole nor his wife testified at trial.

Recognizing that, as a matter of law, laying the evidentiary foundation for the admission into evidence of the results of a survey requires, *at a minimum*, the testimony of the *survey director* (*Piper v. Aircraft Corp. v. Way Aero, Inc.* (7th Cir. 1984), 741 F.2d 925, 931), the majority opinion completely ignored the above described testimony and concluded that Dr. Johnson's testimony, "established that he functioned as the survey director." There is absolutely no evidentiary support for such a conclusion.

The most that can be said about Dr. Johnson's connection with the survey, based on his own testimony, is that he designed the questions, contracted out the conduct of the survey and monitored, by telephone, the status of the survey through the actual survey directors, Dr. and Mrs. Cole. Thus, as a matter of law, there was no proper foundation laid for the admission into evidence of Exhibit 44.

Regardless of how crucial the information may be, the district court and the Ninth Circuit cannot be allowed to use their judicial power to circumvent well established rules of evidence no matter what altruistic motives they may have.

VI.
CONCLUSION

This case raises substantial questions regarding the limits on judicial power and the extent to which the judiciary may become an advocate for a party in order to further objectives of a court approved consent decree. This case also presents an opportunity for this Court to reaffirm its rulings in the area of Fair Housing Laws and ensure that the Ninth Circuit adheres to those rulings.

For all the foregoing reasons, Hawthorne respectfully requests that the court grant its petition for certiorari.

April 21, 1989

Respectfully submitted,

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By

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APPENDIX A

APPENDIX A

Ralph W. KEITH and Esther May Keith, husband and wife; Harold E. Grady, and Edith W. Grady, husband and wife; James B. Gillispie and Helen M. Gillispie, husband and wife, on behalf of themselves and all others similarly situated; National Association for the Advancement of Colored People, a nonprofit corporation; the Sierra Club, a nonprofit corporation; Environmental Defense Fund, Inc., a nonprofit corporation; Freeway Fighters, an unincorporated association; City of Hawthorne, a municipal corporation, Plaintiffs,

v.

John A. VOLPE, individually and as Secretary of Transportation; Sheridan A. Farin, individually and as Administrator for Region 7, Federal Highway Administration, Department of Transportation; Donald E. Trull, individually and as Division Engineer, Federal Highway Administration, Department of Transportation; California Highway Commission; California Department of Public Works; James A. Moe, individually and as Director of California Department of Public Works; Robert Datel, individually and as State Highway Engineer, California Division of Highways, California Department of Public Works, Defendants.

Earl WRIGHT, Rose Kimball Hillman, Pablo Zapeta, and Minnie Hadley, Additional Plaintiffs on Supplemental Complaint,

v.

CITY OF HAWTHORNE, a municipal corporation; City Council of the City of Hawthorne; Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker, and Davis M. York, as members of the City Council of the City of Hawthorne, Defendants on Supplemental Complaint.

California Department of Housing and Community Development; California Department of Transportation, Intervenors on Supplemental Complaint.

Goldrich & Kest, Inc., a California Corporation, Intervenors on Supplemental Complaint.

Civ. No. 72-355-HP.

United States District Court,
C.D. California.

Sept. 3, 1985.

Persons living in path of proposed freeway and others filed environmental and civil rights lawsuit against state and federal governmental officials. Parties entered into a consent decree requiring that state and federal defendants provide freeway displacees with 3,700 units of replenishment housing. In response to city's actions concerning two housing developments containing such replenishment housing, plaintiffs submitted motion for leave to file supplemental complaint to add allegations that city illegally refused to permit construction of two replenishment rental developments within its borders. The District Court, Pregerson, Circuit Judge, sitting by designation, held that: (1) city imposition of 35%

limitation on number of units in development that could be rented to low income tenants and its denial of lot split, zone change and site development applications for another development violated Title VIII, and (2) city's actions violated California statute prohibiting discrimination against a residential development because of race of intended occupants, because development is intended occupants, because development is intended for occupancy by persons of low and moderate income, and because development is state-assisted.

So ordered.

(§§§ = West Key Numbering System)

1. Federal Courts §§§15

Because federal claims in Title VIII action had substance sufficient to confer subject-matter jurisdiction on district court, and state and federal claims derived from common nucleus of operative fact, court also had pendent jurisdiction of California Government Code and California Constitution causes of action. Civil Rights Act of 1968, §§801-901, 42 U.S.C.A. §§3601-3531.

2. Civil Rights §§§13.6

To establish standing, a Title VIII plaintiff must merely show the Article III minima, i.e., that he suffered a distinct and palpable injury to himself that is likely to be redressed if the relief is granted. Civil Rights Act of 1968, §§801-901, 42 U.S.C.A. §§3601-3631; U.S.C.A. Const. Art. 3, §1 et seq.

3. Civil Rights §§§13.6

Low income minority plaintiffs due to be displaced by freeway had standing to bring claim under Title VIII challenging city's imposition of 35% limitation on number of units in replacement housing development that could be rented to low income tenants and city's denial of lot split, zone change, and site development application for another replacement housing project, considering that plaintiffs were residents of city, and that if relocation housing was not built before they were displaced, they would have to move outside of city to find affordable housing. Civil Rights Act of 1968, §§801-901, 42 U.S.C.A. §§3601-3631.

4. Civil Rights §§§70

Low income minority plaintiffs due to be displaced by freeway had standing to bring claim, under subsections of California Government Code [West's Ann.Cal.Gov. Code §65008(b,c)], which prohibit discrimination against a residential development on basis of race or low income level of intended tenants, challenging city's imposition of 35% limitation on number of units in replacement housing development that could be rented to low income tenants and city's denial of slot split, zone change, and site development applications for another replacement housing development; moreover, developer who intervened also had standing to bring claim under same statute.

5. Civil Rights §§§70

Low income minority plaintiffs due to be relocated by freeway had standing to bring claim, under subsection of California Government Code [West's Ann.Cal.Gov. Code §65008(d)], which prohibits city from imposing

requirements on a residential development financially assisted by state or federal governments different from those imposed on nonassisted developments, challenging city's imposition of 35% limitation on number of units in replacement housing development that could be rented to low income tenants, considering that they showed a "distinct and palpable injury" as a result of city's 35% requirement in that state refused to finance development such a requirement existed and developer would not build development without state assistance; moreover, state intervenors had standing because they were the agencies providing residential development financial assistance referred to in statute.

6. Civil Rights §§§13.13(1)

Once a Title VIII plaintiff has established a prima facie case by demonstrating racially discriminatory effect, burden shifts to defendant to demonstrate that nondiscriminatory reasons justify its conduct; if defendant offers no valid nondiscriminatory reasons, court must determine whether they are substantial enough to justify the racially discriminatory effect. Civil Rights Act of 1968, §§801-901, 42 U.S.C.A. §§3601-3631.

7. Civil Rights §§§13.13(3)

Low income minority plaintiffs due to be displaced by freeway established prima facie case that city violated Title VIII by imposing 35% limitation on number of units in replacement housing development that could be rented to low income tenants and by denying lot split, zone change, and site development applications for another replacement housing project, considering evidence of discriminatory effect in that failure to build projects would force low income minority displacees to move

outside city, that city failed to show any legitimate interest in taking challenged actions, and that plaintiffs did not seek to compel city affirmatively to provide housing for members of minority groups, but merely to enjoin city from interfering with private property developers who wished to provide such housing.

8. Civil Rights §§§13.13(3)

City's justifications for imposing 35% limitation on number of units of housing development that might be rented to low income tenants and its denial of lot split, zone change, and site development applications for another housing development, including claim that actions furthered its policy of dispersing low income residents throughout city, and that it acted to prevent overcrowding of schools, increase in traffic, increase in housing density, and loss of taxes, failed to rebut prima facie case established by low income minority plaintiffs that city's actions violated Title VIII; moreover, city did not establish that developer's ability to build housing on one or more of 52 alternate parcels eliminated any adverse effect on low income racial minorities caused by city's actions. Civil Rights Act of 1968, §§801-901, 42 U.S.C.A. §§3601-3631.

9. Federal Courts §§§270

Eleventh Amendment's grant of sovereign immunity to the states did not bar district court from determining whether city officials complied with California law prohibiting discrimination against residential developments because of race or income of intended occupants, where relief against city was not equivalent of monetary judgment against the state. U.S.C.A. Const.Amend. 11; West's Ann.Cal.Gov. Code §65008.

10. Federal Courts §§§390

Where state's highest court has not yet decided issue, federal court exercising pendent jurisdiction over the state law claim must use its own best judgment in predicting how state's highest court would decide case.

11. Civil Rights §§§72

A showing of discriminatory impact is sufficient to establish a violation under section of California Government Code [West's Ann.Cal.Code §65008(b)] prohibiting discrimination against a residential development because of race of intended occupants.

12. Civil Rights §§§11.5

City imposition of 35% limitation on number of units in housing development that could be rented to low income minority tenants due to be displaced by freeway and its denial of lot split, zone change, and site development applications for a similar development intended as replacement housing violated section of California Government Code [West's Ann.Cal.Gov. Code §65008(b)] prohibiting discrimination against a residential development because of race of intended occupants.

13. Zoning and Planning §§§14

City's imposition of 35% limitation on number of units in housing development which could be rented to low income tenants facially conflicted with subsection of California Government Code [West's Ann.Cal.Code §65008(c)] prohibiting discrimination against a residential development because development is intended for

occupancy by persons and families of low and moderate income and statute preempted city's power to impose the limitation.

14. Civil Rights §§§72

Proof of discriminatory effect is sufficient to establish a violation of section of California Government Code [West's Ann.Cal.Gov. Code §65008(c)] prohibiting discrimination against a residential development because development is intended for occupancy by persons and families of low and moderate income.

15. Civil Rights §§§11.5

City's denial of applications for rezoning, lot split, and site development for housing project intended to serve as replacement housing for low income households due to be displaced by freeway violated section of the California Gov.Code [West's Ann.Cal.Gov.Code §65008(c)] prohiting discrimination against a residential development because development is intended for occupancy by persons and families of low and moderate income, considering that city's frustration of development had a greater adverse effect on low income than on middle and high income displacees because low income displacees had least amount of affordable housing available to them.

16. Civil Rights §§§11.5

City's requirement that state-assisted developer of residential housing project agree to record a covenant limiting to 35% number of units rented to low income households violated section of California Government Code [West's Ann.Cal.Gov. Code §65008(d)] prohibiting a city from imposing different requirements on a state-

assisted residential development from those imposed on a nonassisted development, considering that city required no developer except state-assisted developer to record such a covenant.

Appendix

17. Evidence §§§177

Summary report of survey seeking information on racial and economic background of persons displaced by freeway was admissible in action challenging city's decision regarding replacement housing, under Federal Evidence Rule 1006 providing that contents of voluminous writing which cannot conveniently be examined in court may be presented in form of summary, considering that court could not conveniently examine 253 completed survey questionnaires and compute percentage of different responses to 23 questions. Fed. Rules Evid.Rule 1006, 28 U.S.C.A.

18. Evidence §§§318(4)

Summary report of survey seeking information on racial and economic background of persons due to be displaced by freeway was admissible in action challenging city's decisions regarding replacement housing projects, under "catch-all" exception to hearsay rule, considering that survey results were evidence of facts material to plaintiffs' allegations that city's actions had an adverse racial and economic impact on displacees, that survey was more probative on issue of adverse impact than any other evidence which plaintiffs could procure through reasonable efforts, and that general purposes of rules of evidence and interest of justice would best be served by admission of survey into evidence; moreover, plaintiffs

established that survey had equivalent circumstantial guarantees of trustworthiness. Fed. Rules Evid.Rule 803(24), 28 U.S.C.A.

19. Evidence §§§177

Summaries of information compiled by California Department of Transportation on racial and economic background of persons due to be displaced by freeway were admissible in action challenging actions of city with regard to replacement housing, under Federal Evidence Rule 1006 providing that contents of voluminous writings which cannot be conveniently examined in court may be presented in form of a summary, considering that it would have been inconvenient for court to examine all relevant files of Department to glean out pertinent information. Fed.Rules Evid.Rule 1006, 28 U.S.C.A.

20. Evidence §§§333(1)

Summaries of information compiled by California Department of Transportation concerning racial and economic background of persons due to be displaced by freeway were admissible in action challenging city's actions concerning replacement housing, under public records exception to hearsay rule, notwithstanding contention that additional information put into summaries was inadmissible because it was not obtained "from an investigation made pursuant to authority granted by law," but was gathered as a result of court's order, considering that additional information was the same type of information that Department routinely gathered in regular course of business, pursuant to authority granted by law. Fed.Rules Evid.Rule 803(8)(C), 28 U.S.C.A.

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MEMORANDUM AND ORDER ENJOINING HAWTHORNE FROM VIOLATING TITLE VIII, 42 U.S.C. §3604(a), AND CALIFORNIA GOV.CODE §65008(b), (c) & (d).

FACTS

PREGERSON, Circuit Judge.

In February of 1972, persons living in the path of the proposed I-105 or Century Freeway, the Los Angeles chapter of the National Association for the Advancement

of Colored People (NAACP), and others[1] filed this environmental and civil rights lawsuit against state and federal governmental officials.[2] In April of 1972, the plaintiffs amended the complaint to add the city of Hawthorne, located in the path of the freeway, as an additional plaintiff. The First Amended Complaint requested injunctive and declaratory relief that would require governmental officials to comply with federal and state laws designed to (1) protect the environment; (2) assure the availability of decent, safe, and sanitary replacement housing.

In July of 1972, this court preliminarily enjoined further work on the freeway project until federal and state officials complied with environmental protection and relocation assistance statutes. *Keith v. Volpe*, 352 F.Supp. 1324 (C.D.Dal.1972), *aff'd en banc sub nom. Keith v. California Highway Commission*, 506 F.2d 696 (9th Cir.1974), *cert. denied*, 420 U.S. 908, 95 S.Ct. 826, 42 L.Ed.2d 837 (1975).

After this court's decision, the parties entered into negotiations that culminated in the Amended Final Consent Decree (the Consent Decree). On September 22, 1981, this court approved the Consent Decree, dissolved the preliminary injunction, and permitted further work on the freeway project pursuant to the decree's

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[1] The plaintiffs also included the Sierra Club, the Environmental Defense Fund, and the Freeway Fighters. *See* First Amended Complaint at pp. 10-11.

[2] The defendants included the Secretary of the United States Department of Transportation, the Administrator for Region 7 of the Federal Highway Administration, the Division Engineer for the Department of Transportation, the California Highway Commission, the California Department of Public Works, the Director of the California Department of Public Works, and the State Highway Engineer and Chief of the Division of Highways. *See* First Amended Complaint at pp. 11-13.

provisions. Under paragraphs VI and VIII of the decree, this court retained jurisdiction to enforce or amend the decree until the court enters a Judgment of Dismissal after full compliance with all terms of the decree. Amended Final Consent Decree at pp. 15-16.

One of the purposes of the decree is "to provide for the housing needs of those living in the area of the proposed path of the freeway."[3] Amended Final Consent Decree at p. 3. In particular, the decree requires that state and federal defendants provide freeway displacees with 3700 units of decent, safe and sanitary replenishment housing either by rehabilitating existing structures or constructing new units. *Id.*, Exhibit B at pp. 1-4. Replenishment housing is to be provided in accordance with the decree's "Housing Plan." Amended Final Consent Decree at pp. 4, 15. The decree incorporates an Exhibit B entitled "Development and Implementation of Housing Plan," detailing the state and federal defendants' commitments to "the provision of housing as part of the I-105 project in order to replenish the housing stock of communities affected by the freeway and to relocate persons now residing with the right-of-way." *Id.*, Exhibit B at p. 1. The California Department of Housing and Community Development (HCD) is the lead agency responsible for coordinating and implementing the Housing Plan. *Id.*, Exhibit B at p. 9. The decree also establishes a Housing Advisory Committee, which includes representatives of each of the cities affected by the freeway, to assist HCD in preparing the Housing Plan. *Id.*, Exhibit B at pp. 11-14.

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[3] The decree also provides for an affirmative action program to ensure that qualified women and minority contractors and employees get a fair share of the construction contracts and the 20,000 jobs the project is creating.

Exhibit B sets out certain basic parameters HCD must follow in preparing the Housing Plan. Amended Final Consent Decree, Exhibit B at p. 16. Under the Housing Plan, 55% of all replenishment units must be affordable to low income households and 25% must be affordable to moderate income households.[4] Low and moderate income households displaced by the Freeway must be given first priority to occupy the replenishment rental units.[5] Finally, the Housing Plan must place as many of the units as possible in the primary zone" — i.e., a zone six miles on each side of the proposed Century Freeway right-of-way.[6]

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[4] Exhibit B states that at least 5% of all units must be affordable to very very low income households, defined as households whose incomes do not exceed 25% of the median income for the Los Angeles Standard Metropolitan Statistical Area (LA SMSA) as adjusted for household size; 25% of the units must be affordable to very low income households, defined as households whose incomes are greater than 25%, but not more than 50%, of the median income for the LA SMSA as adjusted for household size; 25% of the units must be affordable to low income households, defined as households whose incomes are greater than 50%, but not more than 80%, of the median income for LA SMSA as adjusted for household size; and 25% of the units must be affordable for moderate income households, defined as households whose incomes are greater than 80%, but not more than 120%, of the median income for the LA SMSA as adjusted for household size. Amended Final Consent Decree, Exhibit B at pp. 20-21.

[5] Second priority goes to households on housing authority waiting lists whose incomes fall within the target populations. Third priority goes to all other households whose incomes fall within the target populations. Amended Final Consent Decree, Exhibit B at pp. 23-24.

[6] Exhibit B states that there shall be three distinct zones for placement of the replenishment units:

> The primary zone approximates an area within six miles on each side of the I-105 right-of-way; the secondary zone extends an additional six miles; and the tertiary zone yet another six miles. The Housing Plan . . . will attempt to place as many

The freeway, when completed, will run through the northern edge of Hawthorne, affecting census tracts 6017, 6020.02, 6021.01, and 6027. Although the freeway will reduce Hawthorne's housing stock by approximately 1,104 household units, the Housing Plan allocates only 275 units of replenishment housing to be built in Hawthorne.[7] Moreover, to date, there are only two Century Freeway-related housing projects pending construction in Hawthorne: a 44 unit condominium development and a 26 unit apartment development, neither of which required any zone changes, lot divisions, or special use permits from the city. Exhibit 202 at pp. 3-4. There is also a 42 unit condominium development on property that the city is presently in the process of annexing and 16 single family dwellings outside the city limits, but within Hawthorne's sphere of influence. *Id.* Even including the developments outside of Hawthorne's city limits, there are only 128 units of housing pending development out of a total of 275 units allocated.

The litigation presently before this court concerns only two Century Freeway apartment developments proposed to be constructed in the Moneta Gardens area of Hawthorne.

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replacement units as possible in the primary zone; if suitable sites are unavailable, the remainder should be placed in the secondary zone; if suitable sites still remain, the units may be proposed for siting in the tertiary zone. If there are still insufficient sites available in all three zones, the Project Director may provide for relocation beyond the identified zones but in each instance must attempt to locate the structures as close to the Corridor area as possible and reasonable.

Amended Final Consent Decree, Exhibit B at p. 11.

The City of Hawthorne is within the primary zone and thus first choice for the placement of replenishment housing.

[7] Hawthorne's representative on the Housing Advisory Committee participated in setting this figure.

The first, the "Cerise Development," located at 14330 Cerise Avenue, consists of 32 apartments units. On January 26, 1984, the developer, Shapell Housing Inc., filed applications with Hawthorne's Planning Department for a change of zone from M-1 (limited industrial) to R-3 (high density residential) and for a site development permit. The Century Freeway Housing Program had approved the project and the State had agreed to fund it pursuant to the decree.[8] Exhibit 6 at p. 2.

The Planning Department recommended approval of the applications, stating that:

> Staff analysis of the unit design and project density finds it to be a good example of a high density development that adequately mitigates the overpowering mass of typical high density residential developments. Also, the spacial arrangement of the units, in staff's opinion, creates a living environment which is protective and complimentary with other residential development in the area.

Exhibit 6 at p. 2.

However, "[n]otwithstanding" the project's advantages, the staff noted that "the project is unique to the city as it is funded by a State agency." *Id.* The staff concluded that the Consent Decree's requirement that 55% of the units be rented to low income tenants conflicted with the city's policy "to support the dispersion of low income housing" because "the project clearly presents itself as a concentration of low or

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[8] The two rental housing projects at issue, the Cerise and the Kornblum Developments, are both "turnkey projects." HCD selects the developers' projects, funds the construction, and then sells the projects to private parties after the projects' completion. *See* Exhibit 6 at p. 3.

moderate income households." *Id.* at p. 3. Therefore, the staff recommended approval of the developer's applications on condition that the developer record a covenant providing that only 20% of the units could be rented to low income households. *Id.* at 5. The Planning Department staff subsequently revised its recommendation for approval, increasing the percentage of low-income units to 35%. Exhibit 7 at p. 4.

On September 5, 1984, the Planning Commission approved the Cerise Development change of zone and site development applications subject to the 35% covenant the Planning Department had recommended. Exhibit 208.

Shapell appealed the decision of the Planning Commission to the Hawthorne City Council. Before the public hearing on this appeal, the Director of HCD sent a letter to the Mayor of Hawthorne, explaining that because the 35% covenant conflicted with the terms of the Consent Decree, the State would be unable to fund the Cerise Development if the covenant were required.[9]

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[9] In letter dated November 21, 1984, the Director of HCD altered her position and assured the city that "we will adhere to our prior agreement that the projects will be maintained at the 35 percent low income to 65 percent moderate/middle income throughout the life of the project." Exhibit 8 at p. 2. HCD apparently believed that an outright restrictive covenant was illegal under the California Government Code and precluded State funding, but that an informal agreement to administratively restrict the proportion of low income residents was acceptable. Exhibit 21 at pp. 19-22. Whether or not this position has any legal support, it was not persuasive to the Hawthorne City Council, which insisted on the covenant despite the November 21 letter. Moreover, in HCD's last written statement of its position, a letter to the City Manager dated November 27, 1984, HCD's Chief Deputy Director reiterated that the 35% violation was "a serious constraint upon the development of housing for lower-income households, and a possible violation of Government Code

Letter of October 3, 1984, Exhibit 1 at p. 1. Nevertheless, on January 14, 1985, the City Council affirmed the action of the Planning Commission, including its requirement of the 35% covenant.

The second development, the "Kornblum Development," located at 1300 and 13001 Kornblum Avenue, is a 96 unit apartment complex. The developer, Goldrich & Kest, Inc., filed applications for a lot split, a zoning change from H (horticultural) to R-3 (residential), and site development. The Century Freeway Housing Program had earlier approved the project and the State had agreed to fund it pursuant to the decree.

The Planning Department recommended approval of the applications, stating that the Kornblum Development was "a good example of a medium density development that adequately mitigates the overpowering mass of typical two and three story apartment developments in the area." Exhibit 9 at p. 4. The staff recommended, however, that the developer be required to record a covenant, identical to the covenant required for the Cerise development, providing that no more than 35% of the units be rented to low income families. *Id.* at 7.

The Planning Commission held a public hearing on October 3, 1984. A number of Hawthorne residents appeared and expressed opposition to the development.[10]

65008." Exhibit 4 at p. 4.

[10] The Minutes of the Hawthorne Planning Commission stated that one of Hawthorne's residents, Mr. Raymon Sulser, "discussed who would be able to be housed in this project. Past experience has shown that the city was never involved in the selection of who would be located in a similar project. He had read the conditions recommended by staff as outline in the staff report and asked who would enforce these conditions. He was also concerned with traffic, crime, etc. that this project would bring to the area." Exhibit 15 at p. 4.

At the end of the hearing, the Planning Commission voted 3-0, with one abstention, to deny Goldrich & Kest's applications for lot split, zone change, and site development. Exhibit 15 at p. 6.

Goldrich & Kest appealed the Planning Commission's denial of approval to the City Council. The Council held two public hearings on November 13 and November 26, 1984. Local residents attended the November 13 hearing and expressed opposition to the project. They raised concerns about possible loss of taxes to the city, increase in traffic, overcrowding of schools, and failure to maintain the building, but also expressed opposition to the low income tenants that would reside in the building.[11]

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[11] Of the five who addressed the City Council, the two most vocal residents expressed vehement opposition to the low-income status of the future tenants. Mr. Raymon Sulser argued that

> We have developments similar to this — although it's not called the same thing. I'm talking about HCD projects and everything. One of them in [sic] as was stated at the last meeting, is Nickerson Gardens. You know the crime that they have in there. You're going to have some of the same problems in this project that's underway if it is built.
>
> . . . .
>
> [I]t's like a person going out and buying a Mercedes that can't afford to make the payments on it. It's not going to be around long.
>
> . . . .
>
> I — I think we've got enough of low-income housing in the city. We've got a lot of HUD projects that a lot of these other cities don't have. They fought it, and kept it out, and we didn't. And I would like to see you deny this project. There's — they can go to other — I told them of, at the last, of a piece of ground, that's not actually in this city, that is going to be up for sale. Let them build it there. I think we've got enough of it.

Exhibit 20 at pp. 19, 14, 22.

Mr. Gene Williams remarked that

> these windows are going to be hanging out; the screens are going

The developer addressed each of the legitimate concerns raised. He explained that the tax loss to the city, if any, would be minimal and offered to enter a ten year in lieu of property tax agreement to make up the difference in taxes between what the city would receive from the Kornblum Development and what it would receive from any private development. Exhibit 20 at pp. 9-10. To alleviate the concerns about traffic and schools, the developer negotiated with the Century Freeway Housing Program to commit all 36 of the development's one bedroom units to senior citizens, who will not have school age children or cause much traffic at peak hours. Exhibit 20 at p. 4. Finally, the developer explained that the State requires him to create a reserve of 1% of the construction cost to provide for ongoing maintenance costs and that HCD will inspect the premises yearly and order the owner and to make any necessary repairs out of the reserve fund. Exhibit 20 at pp. 53-59.

At the close of the November 13 hearing, the Council members requested the City Manager to research the tax, school, traffic, and maintenance issues. In a letter to the City Council dated November 23, 1984, the City Manager essentially confirmed what the developer had stated at the November 13 hearing. Exhibit 16. He

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to be hanging off. There's going to be graffiti. The little shrubs they're going to plant in the parks are going to be litter on Kornblum Avenue. . . . We don't — We don't need any more hoodlums in our neighborhood. . . . So it's just going to be a mess over in our neighborhood. But if, if they want to get it up there in the high rent price bracket, why we can probably get enough protection over there to handle those people.

. . . .

I think that if they put units in that rent for $1000 per unit that you get your higher class people in there.

Exhibit 20 at pp. 41-42.

reported that the schools in the Moneta area could accommodate between 150 and 200 more students and that the Kornblum Development combined with another 40 unit replenishment development would produce approximately 200 students. *Id.* at p. 1. He also noted that the developer had agreed to participate in a 'school development assessment" if the city imposed it on all new residential developments larger than a single family house. *Id.* at p. 2. The Manager reported that only public housing authorities, such as the Hawthorne Housing Authority, could purchase the Kornblum Development from the State and not pay taxes on it. *Id.* at p. 3. He also confirmed the developer's assertion that HCD conducts an annual inspection to determine when the 1% maintenance fund should be expended. *Id.*

At the hearing on November 26, both Kornblum's developer and the executive director of the Century Freeway Housing Program spoke at length to clarify misconceptions about the mechanics of the low-income rental program and to express their willingness to accommodate Hawthorne's concerns. Exhibit 21 at pp. 7-12, 14-26.

At the end of the discussion, Councilmember Ainsworth stated that she still desired to deny the Kornblum applications for school overcrowding and traffic reasons. Exhibit 21 at pp. 29-30. Councilmember York responded:

> If — if we just let the area alone to our own developers, eventually they're going to be developing that area. We're going to have an additional impact whether it's by this development, or additional development down the line. That's why I'm saying we have more at issue to concern ourself with here besides just this — just this one project. The project as it sits on itself here looks — looks beautiful. But

> there are these other problems about density, school impact — impacting that's going to occur, I think whether this project gets passed or not. I think that a lot of the problems that you're — that's [sic] you're citing are — are going to be affected not just with this project, but with future projects down the line, whether they're smaller projects than this one, or a similar size project.

Id. at pp. 30-31.

Mayor Hocker agreed that "anything that we put over there is going to put in a great deal of traffic. I think anything that's other than this is going to bring even more traffic." Exhibit 21 at p. 32. An unidentified councilmember added that "my problem with this whole project is you keep talking about the impact on the schools, and I'm not convinced that by shutting this project down is going to alleviate the impacting of the schools. Because if this project isn't built, there are going to be other projects crop up, and we are going to have more school children in the area, and I don't see any way for us to get around that." *Id.* at p. 37.

Despite these comments of her co-councilmembers, Councilmember Ainsworth moved to uphold the recommendations of the Planning Commission. Exhibit 21 at p. 31. Councilmember Bookhammer seconded the motion, but explained his decision. He stated that his "main goal is to commit, create to some additional senior citizen housing which it appears that we've done. Not come close to, but have done." *Id.* He voted against the project, however, because "even after all of these comments have been made and the things that were give to the city by the developer, I still hear an adamant — referendum from the residents of the neighborhood that they still do not want this project, and they're the ones who have to live with the project being in their neighborhood . . . I have to go along with that." *Id.* at

pp. 31-32. Councilmember Ainsworth agreed that "it's like Councilman Bookhammer said. The people in the community don't want it." *Id.* at pp. 34-35.

When the issue was put to a vote, Councilmembers Ainsworth, Bookhammer, and York voted against the project, York admitting that he was voting "against my better judgment." Exhibit 21 at pp. 41-42. Only Mayor Hocker voted in favor of the project. Councilmember Ainsworth concluded that "They can fight City Hall and be heard. I think tonight they've felt that they have been heard, and I appreciate it." *Id.* at p. 42.

In its resolutions denying the applications, the City Council did not mention the public opposition, but gave the following reasons for its decisions:

(1) the proposed lot split would create a parcel with continued use for a wood frame single family dwelling and represent poor lot configuration;[12]

(2) proposed zoning for the parcels would leave parcels one and four zoned H (horticultural) and is contrary to principles of good planning;[13]

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[12] At the November 13 hearing, the developer tried to clear up any misconceptions concerning the house currently on the property:

> The 6,000 foot lot, which is a separate parcel on our parcel map, is to be included in the development. It is presently occupied as part of the nursery business. They are going to move the nursery business to the El Segundo frontage and abandon that house. At that time, the house will be torn down and the area with the landscaping will be contributed to the project.

Exhibit 20 at p. 49.

[13] In response to concerns about leaving one half of the approximately ten acre site zoned H (horticultural), the developer prepared a plan to develop commercially the 5 acres that run along El Segundo Boulevard. He offered to present the plan at the November 13 hearing, but was not given the opportunity. Exhibit 20 at pp. 3-4.

(3) the proposed development is in an area designated by the Moneta Gardens Land Use Plan for medium density residential use, and the proposed site development plan would be high density residential use;[14]

(4) the development would contribute to overcrowding of schools;[15]

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[14] The Planning Department, the agency that deals with the city's zoning matters on a daily basis, found the Kornblum development compatible with the planned development in the Moneta Garden Area:

> Good planning states that the use of property shall be in conformance with a "Plan." The proposed Lot Split, Change of Zone and Site Development is located within the Moneta Gardens Land Use Area. The Moneta Plan identifies the land use for the subject property as medium density.
>
> The Moneta Gardens Plan for land use was predicated on the assumption that a lower density was needed to keep the area from being adversely impacted by large apartment complexes. However, in staff's opinion, commercial uses along El Segundo Boulevard, a major traffic artery, would be the highest and best use. As such, staff will be recommending that the Planning Commission initiate the commercial zoning of the property fronting upon El Segundo Boulevard.
>
> If the zoning of the parcels along El Segundo Boulevard occur, then Parcels 2 and 3, if zoned medium density, would become transitional lots. As such, the permitted density would be one unit per 1250 square feet. However, the applicant's site development plan proposes a density of 1998 square feet per unit.
>
> *Staff analysis of the unit design and project density finds it to be a good example of a medium density development that adequately mitigates the overpowering mass of typical two and three story apartment developments in the area.*

Exhibit 9 at pp. 3-4 (emphasis added).

[15] Although it is true that the Kornblum Development would increase the enrollment in the schools servicing the Moneta Gardens Area, the Superintendent of Schools's most recent declaration states that the schools could accommodate 159 more students and that Kornblum will add 119 students. Exhibit 200 at pp. 4-5.

(5) the development would create undue traffic congestion, noise and lack of adequate open space;[16]

(6) the development is inconsistent with applicable and specific general plans;[17]

(7) the development encourages random and incompatible land uses and discourages highest and best land use;[18]

(7) the site is not physically suitable for the proposed density of the development;[19]

(8) the development would be materially detrimental to the public welfare by adding unmitigated traffic congestion, noise, and other adverse conditions associated with overcrowding and would be injurious to property and improvements in the vicinity of the lot split and to adjoining and adjacent properties;[20] and

(9) the development would defeat the intent and purposes of the city's zoning ordinance.[21] *See* Exhibits

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The real problem is Hawthorne's approval of 795 other new housing units in the Moneta Gardens Area which, in conjunction with Kornblum, will overcrowd the schools. Exhibit 200 at p. 4. The City Council simply singled out Kornblum as the culprit. The School District "is not opposed to the particular development known as the Kornblum project," but "to the intense and rapid growth which has taken place in the Moneta Gardens area." *Id.* at p. 5.

[16] There was absolutely no evidence presented to the City Council concerning traffic, noise, or lack of open space.

[17] *See supra* notes 13-14.

[18] *See supra* notes 13-14.

[19] The Planning Department noted that although the permitted density would be one unit per 1250 square feet, the Kornblum development will have one unit for 1998 square feet. Exhibit 9 at p. 4. At the November 26 hearing, Mayor Hocker noted that the Kornblum Development was one-third less dense than other developments in the area. Exhibit 21 at p. 34.

[20] *See supra* note 16.

[21] On the contrary, it appears that the development would further

12-14.

In response to Hawthorne's actions on the Cerise and Kornblum developments, the plaintiffs in this lawsuit submitted a motion for leave to file a supplemental complaint to add allegations that Hawthorne[22] had illegally refused to permit the construction of two replenishment rental developments within its borders. At the same time, the plaintiffs filed a motion to enjoin preliminarily Hawthorne's refusal to permit the construction of the two developments. Hawthorne opposed both motions and submitted to Goldrich & Kest a

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the city's policy of "encourag[ing] innovative uses of federal and other programs that will provide housing." Exhibit 2 at p. 23. Hawthorne's Housing Element, prepared by the Planning Department, notes that "[r]apid increases in new and existing housing costs, as has happened in the past few years, have resulted in the inability of lower income households to successfully compete for decent, affordable housing." *Id.* at p. 19. Therefore, "[o]ne of the City of Hawthorne's policies is to expand housing opportunities for lower income households but avoid concentration of such groups." *Id.* Because "those elderly persons on fixed incomes who do not own a home, or bought one late in life, are in the greatest need[,] . . . [o]pportunities to provide housing for elderly persons are of highest priority." *Id.*

The Housing Element states that 286 new units will have to be built yearly to meet Hawthorne's housing needs and that only 10.3 acres of residentially zoned land are currently vacant. *Id.* at pp. 24, 19. But "[t]here are approximately 19 acres of land zoned for horticultural uses, generally located within existing residential neighborhoods. These properties, if rezoned to R-3 or R-4, would provide additional capacity for 780 dwelling units. The Planning Department will continued to support development proposals for the conversion of horticultural properties to residential uses." *Id.* at p. 25.

[22] The supplemental defendants include the City of Hawthorne; the City Council of the City of Hawthorne; and Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker, and David M. York, as members of the City Council. The court will hereinafter refer to the supplemental defendants as "Hawthorne" or "the city."

compilation of 52 alternate parcels of property on which to build Century Freeway-related housing. Exhibit 202 at p. 7, exhibits B & C.

On April 10, 1985, this court granted plaintiffs leave to file the supplemental complaint[23] and also permitted the California Department of Housing and Community Development, the California Department of Transportation, and Goldrich & Kest, Inc., to intervene in the supplemental action.

The supplemental complaint and motion for preliminary injunction asserted five claims for relief[24] against the City of Hawthorne and its officials for their actions in imposing the 35% limitation on the number of units in the Cerise Development that may be rented to low income tenants and in denying the lot split, change of zone, and site development applications for the Kornblum Development:

1. violation of the Supremacy Clause of the United States Constitution;
2. violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601-3631;
3. violation of the Fourteenth Amendment to the United States Constitution;
4. violation of California Government Code §65008; and
5. violation of Equal Protection Clause, Article I, §7 of the California Constitution.[25]

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[23] On April 15, 1985, the court issued an order detailing its reasons for granting the plaintiffs' motion to file the supplemental complaint.

[24] The plaintiffs also alleged a violation of California Government Code S65583 (West 1983 & Supp.1985), but dropped this cause of action before trial. *See* Pre-Trial Conference Order at pp. 15-18.

[25] The intervenors Goldrich & Kest, the California Department of

Pursuant to Fed.R.Civ.P. 65(a)(2), the parties agreed to advance the trial of the supplemental action on the merits and consolidate it with the hearing of the application for a preliminary injunction. At a bench trial on April 17, 1985, the parties submitted all of the proffered documents into evidence except Exhibits 5 & 11, which it held to be inadmissibly hearsay. After both sides rested, the court heard oral argument on behalf of all of the parties and requested them to file post-trial briefs.

After close review of the briefs and all of the documentary evidence, on May 10, 1985, the court ordered the parties to further brief the question of the plaintiffs' and intervenors' standing. On May 24, 1985, the court reopened the proceedings and requested the plaintiffs and state intervenors to compile information on the racial and economic composition of the Hawthorne census tracts affected by the freeway.[26]

Transportation, and the California Department of Housing and Community Development jointed only in the Supremacy Clause, California Government Code, and California Constitution claims for relief.

[26] On May 24, 1985, the court issued an order requesting the plaintiffs and state intervenors to compile the following information:

1. The racial composition of the Hawthorne displacees in each of the four census tracts affected by the freeway and of the residents in each of the two tracts in which the Cerise and Kornblum Development are proposed to be built.
2. The percentage of Hawthorne displacee households in each of the four affected tracts that are low income households.
3. The percentage of the low income Hawthorne displacee households in each of the four affected tracts that are minority households.
4. The percentage of low income Hawthorne displacee households in each of the four affected tracts that would desire to be relocated in a Century Freeway housing project in Hawthorne.

The court also required that plaintiffs and state intervenors brief the issue whether the requested information was admissible in

In response to the court's requests, the plaintiffs moved to add four additional plaintiffs to eliminate any question concerning their standing to bring the suit. In addition, the plaintiffs and state intervenors went to two separate sources to gather the requested racial and economic data. First, the plaintiffs conducted a telephone and door-to-door survey of the Hawthorne displacees currently residing in the affected census tracts. Second, Caltrans and HCD summarized information in existing Caltrans files on the displacees and supplemented the file search with phone calls and personal interviews. The plaintiffs and intervenors thus presented three separate reports on the racial and economic composition of the affected census tracts: (1) the 1980 U.S. Census data, which they originally submitted with their motion for a preliminary injunction, (2) the results of the telephone and door-to-door survey, and (3) the summary of Caltrans's files.

The City of Hawthorne also summarized the information in Caltrans's files and submitted its summary in addition to 1980 U.S. Census data on the racial composition of the census tract in which the 52 alternate parcels are located.

On July 24, 25, and 30, 1985, the trial resumed. The court heard oral argument on the plaintiffs' motion to add additional plaintiffs and granted the motion. The court also heard testimony and oral argument on the admissibility in evidence of Exhibit 44, plaintiffs' summary report of Dr. James H. Johnson's social survey; Exhibit 45, plaintiffs' and state intervenors' separate summaries of the information contained in Caltrans's active files on Hawthorne displacees; Exhibit 46, plaintiffs' and state intervenors' charts summarizing the results of the numerous separate summaries contained in

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evidence.

Exhibit 45; and Exhibit 201, supplemental defendants' summary of Caltrans's files. At the conclusion of the trial, the court ordered the exhibits admitted into evidence.[27] The court then ordered the case submitted.

JURISDICTION

[1] This court has jurisdiction of the Supremacy Clause and Fourteenth Amendment causes of action pursuant to 28 U.S.C. §1343(a)(3) (1982)[28] and of the Title VIII cause of action pursuant to 28 U.S.C. §1343(a)(4) (1982).[29] Because the federal claims "have substance sufficient to confer subject matter jurisdiction on the court" and the state and federal claims "derive from a common nucleus of operative fact," this court also has pendent jurisdiction of the California Government Code and California Constitution causes of action. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 15 L.Ed.2d 218 (1966). *See Aragon v.*

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[27] On August 14, 1985, the court issued a "minute order" detailing its reasons for admitting exhibits 44, 45 and 46 into evidence. This order is attached at the end of this opinion as "Appendix A."

[28] Section 1343(a)(3) provides that the district courts "shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ." 28 U.S.C. S1343(a)(3) (1982).

[29] Section 1343(a)(4) provides that the district courts "shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. S1343(a)(4) (1982).

Federated Department Stores, 750 F.2d 1447, 1457 (9th Cir.1985).

[2] The plaintiffs have standing to bring the Title VIII cause of action [30] under the principles enunciated in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). In *Gladstone*, the Supreme Court held that Congress, in enacting Title VIII, "expand[ed] standing to the full extent permitted by Art. III." *Id.* at 100, 99 S.Ct. at 1608. To establish standing, the Title VIII plaintiff must merely show the Article III minima — i.e., that he "suffered 'a distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted." *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976)); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76, 102 S.Ct. 1114, 1122-23, 71 L.Ed.2d 214 (1982) ("the only requirement for standing to sue under [Title VIII] is the Art. III requirement of injury in fact.").

[3] In the instant case, three individual low-income minority plaintiffs who will be displaced by the Century Freeway testified that they would like to be relocated in affordable housing in Hawthorne. Ms. Rose Hillman, A Black Hawthorne resident with an income of $12,000, testified that she would like to be relocated in the same vicinity as her current residence and would apply to live

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[30] The plaintiffs allege that Hawthorne violated section 3604, which states that it is unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." 42 U.S.C. S3604(a) (1982). The plaintiffs therefore brought their action under section 3612, which provides that "[t]the rights granted by section [] . . . 3604 . . . of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy. . . ." 42 U.S.C. S3612(a) (1982).

at the Kornblum and Cerise Developments, if they are built. R.T. 36-39 (July 24, 1985). Mr. Earl Wright, another Black Hawthorne resident with an income of approximately $12,000, also testified that he would like to be relocated in the same vicinity and would apply to live at the proposed Kornblum and Cerise Developments, although, if he could afford it, he would prefer to own a house instead of renting an apartment. R.T. 43-46. Finally, Mr. Pablo Zapeta, an Hispanic Hawthorne resident with a family income of approximately $14,000, testified that he would like to be relocated in the Hawthorne area and would apply to live in the proposed Cerise and Kornblum Developments. R.T. 56-59. In addition, Mr. Boris Storzch, of the Century Freeway Housing Program, testified that Hillman, Wright, and Zapeta would be eligible to live in either the Cerise or Kornblum Developments under the Century Freeway Housing Program Relocation Apartment standards. R.T. 76-77.

Hawthorne's denial of the Kornblum applications and imposition of a 35% quota on the number of units that can be rented to low income tenants in the Cerise Development jeopardizes the ability of Hillman, Wright, and Zapeta to relocate in Hawthorne. As noted above, there are, at most, only 128 units of relocation housing currently available in Hawthorne. If more relocation housing isn't built soon — before Hillman, Wright, Zapeta, and 1,100 other Hawthorne families are displaced — the displacees will have to move outside of Hawthorne to find affordable housing. These facts constitute a "distinct and palpable injury."[31] *Gladstone*, 441 U.S. at

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[31] Hawthorne contends that to prove injury, Hillman, Wright, and Zapeta must desire to be relocated on the particular blocks of the particular streets where the Kornblum and Cerise Developments are proposed to be built and that no other location inside or outside

100, 99 S.Ct. at 1608. Because their action "focuses on [two] particular project[s] and is not dependent on speculation about the possible actions of third parties not before the court," the plaintiffs have also shown that their injury is likely to be redressed if this court grants the requested relief. *Village of Arlington Heights v. Metropol-*

Hawthorne would be acceptable to them. Hawthorne also contends that Hillman, Wright, and Zapeta must desire to rent a residence as their first choice, and cannot prefer ownership, to demonstrate that failure to build the Kornblum and Cerise Developments injures them.

The court rejects both of these contentions. The plaintiffs need not show that the only place they would like to live is in the Cerise or Kornblum Developments. The need only show that they would like to be relocated in Hawthorne, that affordable housing in Hawthorne is scarce, and that they would like to live in either of the two developments, if built.

In Hawthorne's own "Housing Element," Hawthorne's Planning Department admits that "[r]apid increases in new and existing housing costs, as has happened in the past few years, have resulted in *the inability of lower income households, to successfully compete for decent, affordable housing.*" Exhibit 2 at p. 19 (emphasis added). Ms. Hillman testified that she had been looking for affordable housing in Hawthorne for approximately six months and had been unable to find any. R.T. 40 (July 24, 1985). The fact that the plaintiffs would be equally happy living in a part of Hawthorne other than the Moneta Gardens Area does not eliminate the injury caused by frustration of the two developments if there is not sufficient affordable housing in other parts of Hawthorne to absorb the displacees.

Neither does the fact that the plaintiffs may, like most people, prefer to own a residence, rather than to rent one, erase the injury if there are no affordable residences which they could purchase in Hawthorne. Mr. Wright testified that he had been looking to purchase an affordable residence in Hawthorne for over a year and had been unable to find anything within his income. R.T. 45-46.

Therefore, despite Hawthorne's arguments to the contrary, the court finds that plaintiffs have demonstrated that Hawthorne's frustration of the two developments has sufficiently injured their ability to relocate in Hawthorne to give them standing to bring a suit under Title VIII.

itan Housing Development Corp., 429 U.S. 252, 264, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977). Therefore, the court finds that the plaintiffs have standing to bring their claim under Title VIII.[32]

[4] For the same reasons, the court finds that the plaintiffs have standing to bring their claim under subsections (b) and (c) of California Government Code §65008, which prohibit discrimination against a residential development on the basis of the race or low income level of the intended tenants.[33] In addition, intervenor

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[32] Plaintiffs also alleged that the NAACP had representational standing to bring the Title VIII claim because "NAACP has members who are minority and/or low income displacees residing in the City of Hawthorne and who are adversely affected by the actions of the City of Hawthorne in reducing replacement housing opportunities for displacees." Supplemental Complaint, Exhibit A at p. 5.

But the only NAACP member who testified on behalf of the plaintiffs, Ms. Minnie Hadley, is not a displacee. Instead, she is a Hawthorne resident who is concerned that Hawthorne's denial of the Kornblum and Cerise Developments would deprive her of the social benefit of living in an integrated community. The Supreme Court has acknowledged that such an injury is sufficient to confer standing to bring a Title VIII claim. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-11, 99 S.Ct. 1601, 1612-14, 60 L.Ed.2d 66 (1979). But the plaintiffs have not presented evidence proving that the denial of the two developments would in fact deprive Hadley of the benefits of an integrated society.

Hawthorne is a large city and there is no evidence that Hadley lives in the Moneta Gardens Area, where the two proposed developments will be built. Although Hadley testified that she wanted the Black displacees to remain in Hawthorne so that Black representation in the City government would not be diminished, R.T. 67-68 (July 24, 1985), the Cerise and Kornblum Developments have a total of only 128 units, 70 (55% of 128) of which would be set aside for low income residents. It is therefore speculative whether failure to build the developments would have any significant effect on the character of Hadley's society or Black representation in the City government.

[33] Section 6508 provides in pertinent part:

Goldrich & Kest has standing to bring a claim under subsections (b) and (c) as the developer of one of the residential developments discriminated against.

[5] The plaintiffs also have standing to bring a claim under subsection (d) of California Government Code §65008,[34] which prohibits a city from imposing requirements on a developmental financially assisted by the state or federal governments different from those imposed on nonassisted developments. Because the plaintiffs are clearly the intended beneficiaries of the state's financial assistance, they have shown a "distinct and palpable injury" as a result of the city's requirement that the developer record a covenant providing that no more than 35% of the units in the Cerise Development may be rented to low income tenants: the State has refused to finance the development if such a covenant is recorded, and the developer will not build the development without

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(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, or age of the intended occupants of the development or shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income. . . .

Cal.Gov.Code S65008 (West 1983 & Supp.1985).

[34] Subsection (d) of section 65008 provides that:

No city, county, or city and county may impose different requirements on a residential development or emergency shelter which is subsidized, financed, insured, or otherwise assisted by the federal or state governments or by a local public entity . . . than those imposed on nonassisted developments. . . .

Cal.Gov.Code S65008(d) (West 1983 & Supp. 1985).

state assistance. Moreover, the state intervenors, California Department of Housing and Community Development and California Department of Transportation, have standing because they are the state agencies providing the residential development financial assistance referred to in section 65008(d).[35]

ANALYSIS

I. Hawthorne's imposition of the 35% limitation on number of units in the Cerise Development that may be rented to low income tenants and its denial of the lot split, zone change, and site development applications for the Kornblum Development violate Title VIII, 42 U.S.C. §§3601-3631.

Under Title VIII, commonly known as the Fair Housing Act, it is unlawful to "make unavailable . . . a dwelling to any person because of race, color, religion, sex, or national origin." 42 U.S.C. §3604(a) (1982).

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[35] As indicated by the following discussion in the body of this memorandum and order, this court finds liability on both of the statutory claims for relief. Therefore, it does not reach the state and federal constitutional issues and need not determine whether the plaintiffs or intervenors have standing to bring these claims. "It is well settled that a court should refrain from deciding a constitutional issue when a non-constitutional ground for decision is available." *Guiterrez v. INS*, 745 F.2d 548, 550 (9th Cir.1984) (citing *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 161 n. 2, 99 S.Ct. 2701, 2704 n. 2, 61 L.Ed.2d 450 (1979); *Answander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Siler v. Louisville and Nashville Railroad Co.*, 213 U.S. 175, 193, 29 S.Ct. 451, 455, 53 L.Ed. 753 (1909); *Montana Chapter of Association of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167-68 (9th Cir. 1979)).

The circuits that have address the issue have agreed that the phrase "because of race" does not require proof of discriminatory intent; rather, proof of discriminatory effect may be sufficient to demonstrate a violation of the Fair Housing Act. *See Smith v. Town of Clarktown*, 682 F.2d 1055, 1065 (4th Cir.1982); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir.1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978), *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir.1977), *cert. denied*, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir.1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694, *reh'g denied*, 423 U.S. 884, 96 S.Ct. 158, 46 L.Ed.2d 115 (1975).

[6] Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the defendant to demonstrate that non-discriminatory reasons justify its conduct. *See Rizzo*, 564 F.2d at 149; *Black Jack*, 508 F.2d at 1185. If the defendant offers no valid non-discriminatory reason for its actions, then the plaintiff has succeeded in proving a Title VIII violation. If the defendant does offer valid non-discriminatory reasons, the court must determine whether they are substantial enough to justify the racially discriminatory effect. *See Smith*, 682 F.2d at 1065; *Rizzo*, 564 F.2d at 1293; *Black Jack*, 508 F.2d at 1186-87.

The circuits have applied different standards, however, in determining how important a discriminatory effect is to proving a prima facie case and in determining whether the defendant's proffered justifications are sufficient to rebut the plaintiff's prima facie case. Although the Ninth Circuit has not yet addressed the proper standards to apply, *see Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir.1982), this court finds that Hawthorne

would be liable under any of the standards the other circuits have applied.

A. *Prima facie case.*

[7] The Third and Eighth Circuits seem to take the position that proof of discriminatory effect alone is always sufficient to establish a prima facie Title VIII violation. *Rizzo*, 564 F.2d at 148; *Black Jack*, 508 F.2d at 1184-85. In contrast, the Seventh Circuit has held that proof of discriminatory effect without a showing of discriminatory intent establishes a Title VIII violation only under some circumstances. *Arlington Heights*, 558 F.2d at 1290.

The *Arlington Heights* court listed four "critical factors" in determining whether proof of discriminatory effect is sufficient in each particular case: "(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing." *Id.* at 1290. The Fourth Circuit has also adopted this four factor analysis. *Smith*, 682 F.2d at 1065.

Without deciding whether the Seventh Circuit's stricter requirements for establishing a Title VIII prima facie case are correct, this court finds that the plaintiffs in the instant case not only have shown discriminatory effect, but also have made a sufficient showing on two of the other three factors under the *Arlington Heights* analysis

to establish a prima facie case. The court will now address each of the four factors.

(1) *Effect.* The evidence clearly demonstrates that Hawthorne's actions in imposing the 35% limitation on the Cerise Development, knowing that such a limitation would prevent HCD from funding the project, and in denying the applications for zone change, lot split, and site development on the Kornblum Development had a racially discriminatory effect. The following chart summarizes the results of the plaintiffs' survey (Exhibit 44), the plaintiffs' and state intervenors' summary of the separate summaries of Caltrans's files (Exhibit 46), the plaintiffs' presentation of 1980 U.S. Census data (Exhibits 50-A to 50-C), and the supplemental defendants' summary of Caltrans's files (Exhibit 214):

1. *Racial composition of Hawthorne displacees in census tracts affected by the Freeway and of residents in tracts where Cerise and Kornblum Developments are proposed.*

A. *Tracts affected by the Freeway.*

Plaintiffs' Social Survey (Exhibit 44 at p. 9

26.9% White, 35.2% Black, 26.9% Hispanic, 7.5% Asian or Pacific Islander, 2.4% Other. Total Black and Hispanic = 62.1%. Total Non-White = 73.1%.

Plaintiffs' and State Intervenors's Summary of Caltrans's Files (Exhibit 46 at p. 2)

23.2% White, 37.4% Black, 29.9% Hispanic, 4.4% Asian or Pacific Islander, 5.0% Other. Total Black and Hispanic = 67.3%. Total Non-White = 76.8%.

Plaintiffs' Summary of 1980 U.S. Census Data (Exhibit 50-A at p. 2)

21% White, 54% Black, 21% Hispanic, 3% Asian or American Indian, 1% Other. Total Black and Hispanic = 75%. Total Non-White = 79%.

Supplemental Defendants' Summary of Caltrans's Files (Exhibit 214 at p. 1)

Ethnicity was known in 65.4% of the files reviewed. Of those files, 8.2% were White, 27% Black, 42% Hispanic, 2.6% Asian, 19% Other. Total Black and Hispanic = 69%. Total Non-White = 91.8%.

B. *Tracts where Cerise and Kornblum Developments are proposed.*

Plaintiffs' Summary of 1980 U.S. Census Data (Exhibit 50-B)

Kornblum: 59% White, 10% Black, 23% Hispanic, 8% Asian or American Indian, 1% Other. Total Black and Hispanic = 33%. Total Non-White = 41%.

Cerise: 48% White, 10% Black, 31% Hispanic, 10% Asian or American Indian, 1% Other. Total Black and Hispanic = 41%. Total Non-White = 52%.

2. *Percentage of Hawthorne displacee households that are low income households.*

Plaintiffs' Social Survey (Exhibit 44 at p. 10)

54.5% low income.

Plaintiffs' and State Intervenors' Summary of Caltrans's Files (Exhibit 46 at p. 3)

59.3% low income.

Plaintiffs' Summary of 1980 U.S. Census Data (Exhibit 50-C)

35% low income.

Supplemental Defendants' Summary of Caltrans's Files (Exhibit 214 at p. 1)

Income was known in 58.6% of the files. Of those files, 52% were low income.

3. *Percentage of low income Hawthorne displacee households that are minority households.*

Plaintiffs' Social Survey (Exhibit 44 at p. 11)

Total Black & Hispanic = 63.8%.

Total Non-White = 71.7%.

Plaintiffs' and State Intervenors' Summary of Caltrans's Files (Exhibit 46 at p. 4)

Total Black & Hispanic = 73.6%.

Total Non-White = 78.5%.

4. *Percentage of low income Hawthorne displacee households that desire to relocate in a Century Freeway housing project in Hawthorne.*

Plaintiffs' Social Survey (Exhibit 44 at p. 12)

67.4%

Plaintiffs' and State Intervenors' Summary of Caltrans's Files (Exhibit 46 at p. 5)

68.1%

Supplemental Defendants' Summary of Caltrans's Files (Exhibit 214 at p. 1)

Relocation preference was known in 34.9% of the files. Of those files, 27.8% indicated a desire to relocate in Hawthorne.

The four sources of evidence indicate that 62.1% (social survey) to 75% (U.S. Census) of the displacees are Black and Hispanic, and 73.1% (social survey) to 91.8% (supplemental defendants' file summary) are non-White. Although the four sources of evidence vary widely on the percentage of the displacee households that are low income households — from a low of 35% (U.S. Census) to a high of 59.3% (plaintiffs' file summary) — both the social survey and the plaintiffs' summary of Caltrans's files indicate that the percentage of the low income households that are minority households is roughly the

same as the percentage of the entire group of displacee households that are minority households: 63.8% (social survey) to 73.6% (plaintiffs' file summary) Black and Hispanic, and 71.7% (social survey) to 78.5% (plaintiffs' file summary) non-White. Therefore, even though the 1980 U.S. Census data indicates that only 35% of the displacee households are low income, *see* Exhibit 50-C, the court can assume that the Census data, if available, would show approximately 75% of those low income households as non-White. *See* Exhibit 50-A at p. 2.

The Seventh Circuit observed in *Arlington Heights* that "[t]here are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another." 558 F.2d at 1290. In the instant case, roughly two-thirds of the low income displacees are members of an ethnic minority.[36] The evidence also shows that roughly two-thirds of the displacees would apply to live in a state-assisted Century Freeway housing project in Hawthorne.[37] Because two-thirds of the low-income

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[36] In contrast, the 1980 U.S. Census data on the two tracts where the Kornblum and Cerise Developments would be built shows that roughly four-tenths of the residents of these tracts are members of an ethnic minority — approximately one-half of the percentage of minority persons in the affected tracts. *See* Exhibit 50-B.

[37] On the issue of the percentage of Hawthorne displacees that desire to relocate in Hawthorne, the results of the social survey and plaintiffs' file summary were within 1% of each other: the social survey indicated that 67.4% of the displacees would like to relocate in Hawthorne, Exhibit 44 at p. 12, and the file summary indicated that 68.1% would like to relocated in Hawthorne, Exhibit 46 at p. 5.

In contrast, Hawthorne's file summary indicated that only 34.9% of the displacees would like to relocate in Hawthorne. Exhibit 214 at p. 1. The court finds this result non-probative because, in compiling its statistics, Hawthorne excluded responses that included Hawthorne in conjunction with another location — i.e., Hawthorne did not count

displacees are members of an ethnic minority, failure to build the Cerise and Kornblum Developments, which provide subsidized housing for low-income displacees, impacts minority displacees twice as hard as it impacts white displacees. This showing alone is enough to establish a racially discriminatory effect. *See Smith*, 682 F.2d at 1061, 1065 (there is "no doubt that the black population . . . was adversely affected by the termination of the housing project" where "56% of all poverty-level families in the county are black, and 69.2% of all black families in [the county] are presumptively eligible for low income housing"); *Arlington Heights*,558 F.2d at 1288 (because "a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing," the Village's refusal to permit construction of a low income housing project had a racially discriminatory effect).

In addition, there is a second type of racially discriminatory effect that a facially neutral decision about housing can produce. This is "the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under Fair Housing Act independently of the extent of which it produces a disparate effect on different racial groups." *Arlington Heights*, 558 F.2d at 1290. *See Black Jack*, 508 F.2d at 1186 (trial court erred in failing to find discriminatory effect where only 3% more Blacks were affected than

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the displacees who indicated that they would like to live in Hawthorne or Inglewood, Hawthorne or Torrance, etc. The fact that a displacee would not mind living in another location does not eliminate the injury to him from Hawthorne's failure to permit construction of affordable housing in Hawthorne if the displacee would like to relocate, among other places, in Hawthorne.

Whites because the "ultimate effect" of ordinance in question was to foreclose 85% of Blacks from obtaining housing in Black Jack).

The ultimate effect of frustrating the Kornblum and Cerise Developments in the instant case is to prevent low income minority displacees for continuing to reside in Hawthorne. If affordable housing is not made available in Hawthorne to the displacees by the time they are displaced, they will have to move out of Hawthorne altogether. This is not simply a case of the city preventing non-resident minorities from moving into the city: if replenishment housing is not built in time, Hawthorne will succeed in depopulating itself of a large number of its current minority residents. Hawthorne's own "Housing Element" shows that the tracts affected by the freeway have a higher percentage of minority residents than the other tracts in Hawthorne.[38] Exhibit 2 at p. 6. The Housing Element also acknowledge that there is a much larger percentage of minority than white residents below the poverty level[39] and that the "[r]apid increases

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[38] The plaintiffs submitted Hawthorne's Housing Element, prepared by Hawthorne's Planning Department, as plaintiffs' Exhibit 2. The court finds that the Housing Element is less probative on the issue of the racial composition of the four affected tracts than the social survey (Exhibit 44) or the summary of Caltrans files (Exhibit 46) because the two sources of evidence are more current. However, the Housing Element is the only source of evidence giving statistics on all of the tracts in Hawthorne. Based on 1908 U.S. Census Data, the Housing Element shows that the percentage of Blacks and Hispanics in the affected tracts ranges from 40.6% to 93.6%. In contrast, the tracts where the Cerise and Kornblum Developments are proposed have only 23.8% and 33.1% Black and Hispanic residents, respectively. The Housing Elements shows that the other unaffected tracts in Hawthorne — i.e., tracts not in the path of the freeway — have a similarly low percentage of Black and Hispanic residents. Exhibit 2 at p. 6.

[39] Presumably based on 1980 U.S. Census data, the Housing

in new and existing housing costs . . . have resulted in the inability of lower income households to successfully compete for decent, affordable housing." Exhibit 2 at pp. 9, 19. With 1,104 Hawthorne families facing displacement, and at most only 128 units of replenishment housing in the process of construction in Hawthorne, the failure promptly to start construction of the two developments at issue seriously jeopardizes the ability of a large number of minority residents to continue residing in Hawthorne. Thus, the "ultimate effect" of Hawthorne's actions, like the immediate effect, is racially discriminatory. *See Rizzo*, 564 F.2d at 149 (ultimate effect of city agencies' actions in razing integrated housing for urban renewal, but failing to build replacement housing, was racially discriminatory).

(2) *Intent.* The court finds that the plaintiffs have failed to show that the City Council acted with discriminatory intent.[40] But this is "the least important of

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Element states that "15.4% of the Spanish population; 13.4% of the Asian population; 9.2% of the Black population; and 7.5% of the White population is below the poverty level." Exhibit 2 at p. 9.

[40] To show discriminatory intent, the plaintiffs rely primarily on a statement by a local resident, Mr. Raymon Sulser, at the November 13 hearing, that the Kornblum development will be like "Nickerson Gardens," a predominately Black housing project in Watts. Exhibit 20 at p. 19. Even if "Nickerson Gardens" is a "code word" for minority tenants, as the plaintiffs allege, "[t]he bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Arlington Heights*, 558 F.2d at 1292.

The plaintiffs' failure to prove discriminatory intent does not, however, preclude them from establishing a Title VIII violation if they show, in addition to discriminatory effect, that the City Council's decision to impose the 35% limitation on the number of units in the Cerise Development that may be rented to low income tenants and to deny the rezoning, lot split, and site development applications for the Kornblum Development had no legitimate basis.

the four factors" and "should be partially discounted." *Arlington Heights*, 558 F.2d at 1292, 1294.

> "[I]ntent, motive and purpose are elusive concepts," . . . and attempts to discern the intent of an entity such as a municipality are at best problematic. . . . A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.

Id. at 1290 (quoting *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir.1972) (en banc) (per curiam)). The plaintiffs' failure to prove discriminatory intent in *Arlington Heights* did not preclude them from establishing a prima facie case. *Id.* at 1294. Likewise, the plaintiffs' failure to prove discriminatory intent in the instant case does not preclude them from establishing a prima facie case by a sufficient showing that the other three elements exist.

(3) *Justifications.* Because Hawthorne "is a governmental body acting within the ambit of legitimately derived authority, [this court] will less readily find that its action violates the Fair Housing Act." *Arlington Heights*, 558 F.2d at 1293. Municipalities are traditionally afforded wide discretion in zoning. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9, 94 S.Ct. 1536, 1540-1541, 39 L.Ed.2d 797 (1974). However, as discussed in Section B below, the court finds that Hawthorne's proffered justifications for imposing the 35% limitation on the number of units in the Cerise Development that may be rented to low income tenants and denying the zone change, lot split, and site development applications for the Kornblum Development are merely pretextual. The city's failure to show any legitimate interest in taking

these actions is another factor that weights in favor or the plaintiffs.

(4) *Prohibitory Remedy.* The plaintiffs do not seek to compel Hawthorne affirmatively to provide housing for members of minority groups, but merely to enjoin Hawthorne from interfering with private property developers who wish to provide such housing. "[T]he courts are far more willing to prohibit even nonintentional action by the state which interferes with an individual's plan to use his own land to provide integrated housing" than to "require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing . . . ." *Arlington Heights*, 558 F.2d at 1293. Thus, this factor also favors the plaintiffs.

B. *Hawthorne's justifications.*

[8] Because the plaintiffs have established a prima facie case,the burden shifts to Hawthorne to offer nondiscriminatory reasons for its actions. The Eighth Circuit has held that to rebut a prima facie case under Title VIII, the defendant must "demonstrate that its conduct was necessary to promote a compelling governmental interest." *Black Jack*, 508 F.2d at 1185.

In *Rizzo*, the Third Circuit rejected the *Black Jack* test, holding that the defendant need only prove a compelling governmental interest when the plaintiff has made a showing of purposeful discrimination sufficient to establish a constitutional violation. *Rizzo*, 564 F.2d at 148. Analogizing to the "business necessity" test applied in Title VII cases, the *Rizzo* court formulated the following test for Title VIII cases: "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that

no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* at 149.

Hawthorne justified imposing the 35% limitation on the number of units that could be rented to low income tenants in the Cerise Development as furthering Hawthorne's policy of dispersing low income residents throughout the city. Hawthorne justified its denial of the Kornblum applications primarily because of potential over-crowding of schools, increase in traffic, increase in housing density, and loss of taxes. In addition, to disavow any discriminatory intent or impact, Hawthorne submitted to the plaintiffs and intervenors a list of 52 alternate sites on which Goldrich & Kest allegedly could build the Kornblum Development. The court finds that regardless of whether it applies the Eighth Circuit's "compelling interest" test or the Third Circuit's "legitimate, bona fide interest" test, Hawthorne has failed to meet its burden.

(1) *Dispersion.* The sole proffered reason for requiring the developer to record a covenant restricting the number of units rented to low income tenants at the Cerise Development is to promote the dispersion of low income tenants throughout the city. But Hawthorne's policy, as set forth in its Housing Element, is to "support the dispersion of low income *housing*," not low income *tenants.* Exhibit 2 at p. 23 (emphasis added). There is a subtle, but important difference between dispersing tenants so that only a few are located in any one neighborhood. It is the latter that Hawthorne has adopted as its policy:

> One of the City of Hawthorne's policies is to expand housing opportunities for lower income households but avoid concentration of such groups. However, the constraint to homogeneous dispersion through the city is chiefly economic. *The areas having the*

> *largest percentages of low income households are characterized as having the lowest quality, values and rents which in effect constitute affordable opportunities for such groups.* Programs available to the citizens that combat any or all of these factors are supported by the city and will be provided whenever possible.

Exhibit 2 at p. 19 (emphasis added). Thus, Hawthorne's stated policy is to disperse housing projects into wealthier areas, not disperse tenants among housing projects. Because the Moneta Gardens Area is one of the wealthier neighborhoods in Hawthorne, the proposed Cerise Development actually furthers the city's policy by making rents affordable to qualified low income tenants.

To the extent Hawthorne is arguing that it has an unstated policy of dispersing low income tenants, it has provided no evidence of such a policy. If Hawthorne had legitimately adopted such a policy, Hawthorne would be requiring all developers to make a certain percentage of their housing units affordable to low income households.[41] On the contrary, Hawthorne has never imposed this sort of a requirement on any housing

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[41] To support the proposition that dispersion of low income tenants is a legitimate policy, Hawthorne cites the Sixth Circuit's opinion in *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir.1975), *vacated and remanded for further consideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), *and Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976), 429 U.S. 1068, 97 S.Ct. 800, 50 L.Ed.2d 786 (1977). But at the same time that the Toledo Plan Commission denied the developers' request to rezone, it "suggested that developers be required to include some low-income homes in each new development." 528 F.2d at 877. In the instant case, Hawthorne has limited the number of low income tenants at the Cerise Hawthorne but has made no effort to ensure that the excluded low income tenants are distributed among other residential structures.

development except the Cerise Development.[42] Hawthorne's justification of "dispersion" is simply a pretext for discriminating against low income households and preventing them from moving into better neighborhoods.

(2) *Schools.* Counsel for Hawthorne has argued that the primary reason the City Council denied the applications for the Kornblum Development was to prevent the overcrowding of schools. Yet other actions by Hawthorne's officials have demonstrated the pretextual nature of this justification.

From the period of December 1, 1984, to April 15, 1985, Hawthorne's Building Department issued building permits for 18 apartment developments, with a total of 426 apartment units, to be built in the city. Exhibit 38 at p. 2. Ten of the 18 developments, 242 of the 426 units, are located in the same Hawthorne School District school attendance zone as the proposed Kornblum Development. *Id.* at p. 3.

Moreover, on March 29, 1985, the Planning Department recommended approval of an application for a zone change from H (horticulture) to R-3 (residential) for a 49 unit apartment development in the same school attendance zone as the Kornblum Development. The Planning Department's report states that "[s]chool impact will be felt." but it is "insignificant when contrasted with the area[']s potential to develop high density residential apartments." Exhibit 38, exhibit C at p. 2. The Planning Commission approved the zone change on April 3, 1985, with no opposition from the Hawthorne School District. *Id.*, exhibit D.

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[42] Hawthorne's Planning Department did, however, suggest that the 35% limitation be imposed on the Kornblum Development, the only other Century Freeway-related development the staff considered. Exhibit 9 at p. 7.

Finally, 22 of the 52 alternate sits on which Hawthorne proposes that the Kornblum Development be built are located in this same school attendance zone. Exhibit 37 at p. 2.

Hawthorne cannot convincingly argue that it is concerned with overcrowding schools servicing the Moneta Gardens Area when it approves other developments in the area and suggests that Kornblum be built elsewhere in the area. The developer made every effort to minimize the Kornblum Development's effect on the school by committing all of the single units to senior citizens and by agreeing to participate in a "school development assessment" imposed on all similar residential developments. If Hawthorne is willing to approve other developments in the area that have not made the same concessions, the court will not permit it to deny the Kornblum Development applications on the grounds of school overcrowding.

(3) *Traffic.* Another reason Hawthorne gives for denying the Kornblum applications is the increase in traffic that the development will cause. Yet no evidence was presented to either the Planning Commission or the City Council supporting the proposition that the development would unduly increase the traffic flow.

Of course, the development will create more traffic than the horticultural nursery currently occupying the parcel. But the nursery is admittedly underutilizing the parcel[43] and will be replaced by some other user, either

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[43] In its Housing Element, Hawthorne's Planning Department expresses the need for land on which to build residential developments and supports proposals for the conversion of horticultural properties to residential uses where such properties are located within existing residential neighborhoods. Exhibit 2 at p. 25. The Department observed that most of the residential development is occurring in the south-east quadrant of Hawthorne, where Moneta

commercial or residential. As Mayor Hocker noted, "anything that we put over there is going to put in a great deal of traffic. I think anything that's other than this is going to bring even more traffic."[44] Exhibit 21 at p. 32. Although, as noted above, there is no evidence concerning comparative traffic flows, it is obvious that a commercial development, such as a shopping center, would create more traffic than the proposed apartment development and that this lot is too deep to be feasible for other residential development, such as single family homes.

In short, this court finds increased traffic a conjectural pretext for denying the developer's applications.

(4) *Density.* Hawthorne also offer excessive housing density as a reason for denying the Kornblum applications. Again, absolutely no evidence was presented to either the Planning Commission or the City Council on the comparative density of alternate types of residential developments.

What little evidence there is in the record on this issue supports the conclusion that the project is, if anything, less dense than the alternatives. The Planning Department noted that the developer's requested zoning of the parcels to R-3 would permit 1250 square feet per unit, but the proposed development has a density of 1998 square

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Gardens is located, because the lots are large enough to make the economics of apartment construction feasible. *Id.* at p. 19-20.

[44] In addition, the Kornblum developer tried to minimize the traffic flow by committing the single units to senior citizens, who will not cause much traffic at peak hours, and by repositioning the entrances and exits to the garage so that the residents will exit on a street different from the one they enter. At conference in chambers, the developer also suggested that the city consider installing a traffic light at the relevant intersection and offered to pay a portion, if not all, of the associated costs.

feet per unit, 5/8 as dense as permitted. Exhibit 9 at p. 4. The staff concluded that the project was "a good example of a medium density development that adequately mitigates the overpowering mass of typical two and three story apartment developments in the area." *Id.* Because the City Council heard no facts which would disprove the staff's conclusion, the Council cannot legitimately justify denying the Kornblum applications on ground of excessive density.

(5) *Taxes.* A number of the local residents present at the November 13 hearing apparently believed that if a non-profit organization purchased the Kornblum Development from HCD, it would pay no taxes on the building. Exhibit 20 at pp. 14, 30-31. In his follow-up letter to the City Council, the City Manager explained that only public housing authorities, such as the Hawthorne Housing Authority, could by the building and pay no taxes on it. Exhibit 16 at p. 3. He added that although the county also has a housing authority, the county would not buy a building in Hawthorne without an agreement from the city. *Id.* In short, the entity that purchases the building will have to pay property taxes on it, unless Hawthorne allows its own or the county's Housing Authority to purchase the building.

The remaining question is whether the owner of Kornblum will pay substantially less in taxes than would the owner of a comparable non-Century Freeway development. At the November 13 hearing, the Kornblum developer explained that the building's purchaser would pay 1% of the building's value in property taxes to the county and that the city gets only 7% of that 1%. Thus, for every million dollars of the building's value, Hawthorne receives only $700 in property taxes. Exhibit 20 at pp. 7-8. So, whether the building is valued at one or two million dollars more or less will make no substantial

difference in the amount of property taxes the city will receive.

This court agrees with the City Manager that the building will probably sell for less than a comparable non-Century Freeway development. Exhibit 16 at p. 4. The building's value is generally determined by the income produced. The percentage of the units set aside for low income tenants will lower the income produced and therefore lower the value. But, as noted above, even if the building sold for 5 million instead of 7 million dollars, it would make little practical difference to the city's coffers. Moreover, the developer agreed to record a 10 year covenant that would require the building's owner to pay any difference in property taxes between those based on the valuation the Hawthorne Building Department would make (which would be the same as a comparable non-Century Freeway building). Exhibit 20 at p. 8. Therefore, the loss of taxes to the city, if any, on the Kornblum Development will be far too minimal to justify denying the developer's applications.

(6) *Alternate Sites.* After this lawsuit was commenced, Hawthorne submitted to Goldrich & Kest a compilation of 52 alternate parcels of property upon which Century Freeway replenishment housing allegedly could be built. *See* Exhibit 202, exhibits B & C. Hawthorne argues that the developer's ability to build replenishment housing on one or more of these 52 alternate parcels eliminates any adverse effect on low-income racial minorities caused by the city's refusal to permit construction of the Kornblum Development on its proposed site, 13000 and 13001 Kornblum Avenue.

To disprove adverse effect, however, Hawthorne must do more than simply present a number of parcels where replenishment housing could theoretically be built. The burden is on Hawthorne to identify a parcel of land

within Hawthorne which is properly zoned and suitable for replenishment housing under state standards. *Arlington Heights*, 558 F.2d at 1293. Moreover, time is of the essence. If replenishment housing is not ready in Hawthorne by the time its residents are displaced, they will have to move outside of the city. Thus, Hawthorne also bears the burden of identifying a parcel or combination of parcels on which the Kornblum Development, as presently planned, can be located without undue delay. The time required for the developer to draw up new building and construction plans to fit parcels whose size or configuration vary significantly from the Kornblum parcels and then to submit the new plans for state approval would delay construction of the replenishment housing past the date, even the time required by the Century Freeway Housing Program to approve re-siting the Kornblum Development on a different parcel of property would jeopardize the possibility of replenishment housing being available in time.[46]

The court finds that Hawthorne has failed to meet its burden of identifying a suitable alternate site for the Kornblum Development. The staff of the Century Freeway Housing Program reviewed the alternate parcels and submitted to the court reasons why none of the alternate sites are comparable to the proposed Kornblum site. Exhibit 301A. Twenty of the parcels require rezoning; 15 of the parcels have residential housing currently located on them, violating one of the Century Freeway Housing Program's requirements for development 21 of the parcels are surrounded by industrial or commercial developments, violating the Housing Program's requirement that replenishment housing be

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[46] *See supra* note 45.

surrounded by compatible uses; 4 of the parcels have current commercial use which the Housing Program does not have authority to displace; 6 of the parcels are outside of Hawthorne's jurisdiction and must be annexed before being considered within city limits; and 1 parcel is currently under construction. Exhibit 301A. The Century Freeway Housing Program staff could approve the development of replenishment housing on only 3 parcels — currently used as a park — which, when combined together, would accommodate a total of only 25 units of housing — 71 units less than the proposed Kornblum Development Exhibit 301A at pp. 10-11.

Goldrich & Kest also reviewed the alternate parcels and sent letters to owners of eight sites[47] that could possibly be suitable for the Kornblum Development. Exhibit 35 at p. 2. Three of the eight owners responded, all stating that their properties were not available for sale. *Id.* Hawthorne's submission of the 52 alternate parcels does not, therefore, disprove the adverse effect caused by its refusal to permit the Kornblum Development to be built at its proposed site.

In conclusion, none of Hawthorne's purported justifications are legitimate. Because the plaintiffs and intervenors have established a prima facie case and Hawthorne has failed to rebut it, the court finds that Hawthorne has violated the Fair Housing Act. 42 U.S.C. §3604(a).

II. Hawthorne's imposition of the 35% limitation on the number of units in the Cerise Development that may be rented to low income tenants and its

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[47] Whereas Goldrich & Kest considered eight of the alternate sites as possibly suitable for the Kornblum Development, Hawthorne concedes that only 6 of the sites would accommodate the entire 96 unit development. Exhibit 202 at p. 7.

denial of the lot split, zone change, and site development applications for the Kornblum Development violate California Government Code §65008.[48]

[9] The California legislature has extended the protection against discrimination in housing that Congress provided in Title VIII. California Government Code §65008 outlaws discrimination against *residential developments* in addition to people and outlaws discrimination on the basis of *income* in addition to race. Section 65008 provides in pertinent part:

(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, or age of the intended occupants of the development or shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income. . . .

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[48] The Eleventh Amendment's grant of sovereign immunity to the States does not bar this court from determining whether Hawthorne's officials complied with California law. Where, as here, relief against a locality or its officials is not the equivalent of a monetary judgment against the State, "the Eleventh Amendment does not apply to 'countries and similar municipal corporations.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 920 n. 34, 79 L.Ed.2d 67 (1984) (quoting *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977)).

> (d) No city, county, or city and county may impose different requirements on a residential development or emergency shelter which is subsidized, financed, insured, or otherwise assisted by the federal or state governments or by a local public entity . . . than those imposed on nonassisted developments. . . .

Cal.Gov.Code §65008 (West 1983 & Supp. 1985).

[10] As a federal court exercising pendent jurisdiction over a state law claim, this court "must apply state law as the state's highest court would." *Hillery v. Rushen*, 720 F.2d 1132, 1138 n. 5 (9th Cir.1983). But the California Supreme Court has not yet decided a case involving section 65008. Indeed, the only court that has done so is a California Court of Appeal in *Bruce v. City of Alameda*, 166 Cal.App.3d 18, 212 Cal.Rptr. 304 (1985). In such a situation, this court's task is to use its' " 'own best judgment in predicting how the state's highest court would decide the case.' " *Fiorito Brothers, Inc. v. Fruehauf Corp.*, 747 F.2d 1309, 1314 (9th Cir.1984) (quoting *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir.1980)).

(1) *Discrimination on the basis of race.* Subsection (b) of section 65008 prohibits discrimination against residential developments "because of" the race of the intended occupants.

The California Supreme Court has taken the position that a showing of discriminatory impact on a racial minority is sufficient to prove a constitutional violation. *See Crawford v. Board of Education of Los Angeles*, 17 Cal.3d 280, 289-302, 130 Cal.Rptr. 724, 551 P.2d 27 (1976); *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 957-58, 92 Cal.Rptr. 309, 479 P.2d 669, *cert. denied*, 401 U.S. 1012, 91 S.Ct. 1266, 28 L.Ed.2d 549 (1971); *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 881, 31 Cal.Rptr. 606, 382 P.2d 878 (1963). *See*

Larry P. v. Riles, slip op. at 374, *petition for reh'g pending* (9th Cir. Jan. 23, 1984) ("To prove a violation of the state constitution equal protection clause requires only a showing of de facto segregation").

[11] In enacting section 65008, the California legislature undoubtedly intended to provide greater protection against discrimination in housing than the constitutional guarantees. If a showing of discriminatory intent is unnecessary to establish a constitutional violation, it should likewise be unnecessary to establish a violation of section 65008(b). Moreover, the California legislature's use of the Title VIII "because of race" language supports interpreting section 65008(b) to require proof only of discriminatory effect. In short, this court finds that a showing of discriminatory impact is sufficient to establish a violation under subsection (b) of section 65008.[49]

[12] Therefore, for the same reasons this court finds that Hawthorne's actions constituted a violation of Title VIII, *see supra* pp. 1148-1156, this court finds that Hawthorne's imposition of the 35% limitation on the number of units in the Cerise Development that may be rented to low income tenants and denial of the Kornblum applications constituted a violation of California Government Code §65008(b).

(2) *Discrimination on the basis of income.* Subsection (c) of section 65008 prohibits discrimination against a residential development "because the development . . . is

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[49] Hawthorne concedes that the burden of proof applied to Title VIII claims should be applied to section 65008 claims "since the two laws are, but for the protection afforded low income persons in Government Code Section 65008, substantially the same." Supplemental Brief of the City of Hawthorne and the Members of the Hawthorne City Council at p. 34.

intended for occupancy by persons and families of low and moderate income. . . ."

The issue before the court in *Bruce v. City of Alameda*, 166 Cal.App.3d 18, 212 Cal.Rptr. 304 (1985), was the validity of an ordinance that provided "[f]or a period of five years no more government subsidized rental housing units shall be developed in the City of Alameda, unless development of such rental units is first approved by a majority of the voters in the city of Alameda." *Id.* at 20, 212 Cal.Rptr. at 305. This ordinance facially conflicted with both subsections (c) and (d) of section 65008. The *Bruce* court held that "locally unrestricted development of low cost housing is a matter of vital state concern" and that California Government Code §65008 preempted the city of Alameda's power to enact such an ordinance. *Id.* at 22, 212 Cal.Rptr. at 307.

[13] In the instant case, the city of Hawthorne's imposition of a 35% limitation of the number of units in the Cerise Development that can be rented to low income tenants also facially conflicts with subsections (c) and (d) of section 65008. *See infra* p. 1159 (discussing subsection (d)). This court believes that the California Supreme Court would reach the same conclusion as reached by the Court of Appeals in *Bruce*. Therefore, this court holds that California Government Code §65008 preempts the City of Hawthorne's power to impose a 35% limitation on the number of units in the Cerise Development that can be rented to low income tenants.

[14] Hawthorne's denial of the Kornblum applications, on the other hand, does not facially conflict with California Government Code §65008(c). To date, no court has addressed the plaintiff's burden of proof under section 65008(c) in these circumstances. This court must decide whether section 65008(c) requires the plaintiffs and the intervening developer to prove intent to

discriminate on the basis of wealth, or merely that the actions have a discriminatory effect on low income persons. In light of the California Supreme Court's position that de facto discrimination on the basis of wealth is sufficient to prove a constitutional violation, *Serrano v. Priest*, 5 Cal.3d 584, 590, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971), *appeal after remand*, 18 Cal.3d 728 135 Cal.Rptr. 345, 447 P.2d 929 (1976), *cert. denied*, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079 (1977), this court holds that proof of discriminatory effect is sufficient to establish a violation of California Government Code §65008(c).[50]

[15] Hawthorne's denial of the Kornblum applications for rezoning, lot split, and site development has an unmistakably adverse impact on low income persons. There is a dearth of decent housing in Hawthorne that is affordable to low income residents. Exhibit 2 at pp. 17, 19. The construction of the Freeway will eliminate a large number of affordable units. Over one thousand households will be displaced and at least 35% of those are low income households. At most, only 128 units of replenishment housing are under construction in Hawthorne and only 55% of those units would be affordable to low income displacees. Unless sufficient additional low income housing is built in Hawthorne by the time its residents are displaced, the low income displacees will have to move outside of Hawthorne to find affordable housing. In short, Hawthorne's frustration of the Kornblum Development has a greater adverse effect on low income than on middle and high income Hawthorne displacees because the low income displacees have the least amount of affordable housing available to them.

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[50] Hawthorne concedes that proof of discriminatory intent is unnecessary. *See supra* note 49.

And, as discussed *supra* pp. 1152-1156, this court finds that all of Hawthorne's purported justifications are pretexts for discriminating against the low income tenants that would reside in the Kornblum Development. Therefore, this court finds that Hawthorne's actions in denying the Kornblum applications also violated subsection (c) of California Government Code §65008.

(3) *Discrimination on the basis of government assistance. Subsection (d) of section 65008 prohibits a city from imposing different requirements on a state-assisted development from those imposed on a nonassisted development.*

[16] Hawthorne has required no developer except the Cerise developer to record a covenant providing that no more than 35% of the units can be rented to low income tenants. Indeed, it is clear that Hawthorne imposed this requirement because the Cerise Development is a Century Freeway-related development. In suggestioning a limitation on the number of low income tenants, the Planning Department stated that "the project is unique to the city as it is funded by a State agency." Exhibit 6 at p. 2. The Planning Department felt that the California Department of Housing and Community Development would require too many of the units to be set aside for low income tenants, conflicting with Hawthorne's policy of dispersing low income housing. *Id.* at p. 3.

In light of the fact that Hawthorne has not imposed this requirement on any other development and the fact that Hawthorne imposed this requirement on the Cerise Development because it is state assisted, this court finds that Hawthorne's requirement of a covenant limiting to 35% the number of units rented to low income households is a clear violation of section 65008(d).

It could be argued that Hawthorne also imposed requirements on the Kornblum Development different

from those it imposes on nonassisted developments because it required the Kornblum developer to prove that the development would not impact schools, density, or traffic. As noted above pp. 1153-1154, Hawthorne has approved a number of other developments in the same area without requiring the developers to affirmatively address these issues. Nevertheless, because this court has found that the City Council's denial of the Kornblum applications violated Title VIII and subsections (b) and (c) of California Government Code §65008, it need not resolve the more difficult issue whether the denial also violated subsection (d).

CONCLUSION

The Century Freeway is one of the most massive freeway construction projects in the history of the United States. Its construction in a populated area has the potential to disrupt the lives of thousands of persons. Plaintiffs filed the original lawsuit and participated in formulating the Consent Decree to ensure that the governmental agencies involved took steps to minimize the disruption and the impact of the project on the human environment. One of the central elements of the decree is the provision of replenishment housing. If a sufficient number of replenishment units are not built at the same time the freeway is constructed, the people displaced by the freeway may have to move substantial distances, losing jobs, breaking up their families, and interrupting their children's education. It is therefore vital that the State proceed with the development of replenishment housing on schedule.

On the other hand, the cities affected by the freeway have a vital interest in controlling the development of their communities. In recognition, of this interest, the Consent Decree provides that the replenishment housing

shall be constructed "so as to be in conformity with applicable zoning, subdivision and building code laws." Amended Final Consent Decree, Exhibit B at pp. 29-30. The decree also directs this court, when evaluating the progress of the housing program, to consider "[t]he ability of communities to which housing has been and is anticipated to be relocated pursuant to the housing program to absorb such housing without unforeseen and excessive adverse impacts on their infrastructure, such as schools, sewers and public services." *Id., Exhibit B at p. 7.*

In light of the important interests on either side, this court has thoroughly examined the evidence in support of the plaintiffs' allegations and the supplemental defendants' defenses. After careful consideration, this court has concluded that the City of Hawthorne's imposition of a 35% limitation on the number of units in the Cerise Development that can be rented to low income households violates Title VIII, 42 U.S.C. §3604(a), and California Government Code §65008(b), (c) & (d). Hawthorne's actions in denying the lot split, zone change, and site development applications for the Kornblum Development violate Title VIII, 42 U.S.C. §3604(a), and California Government Code §65008(b) & (c).

For the reasons stated above, IT IS HEREBY ORDERED that:

1. The supplemental defendants, the City of Hawthorne, the City Council of the City of Hawthorne; and Betty J. Ainsworth, Steve Andersen, Chuck Bookhammer, Guy J. Hocker, David M. York, as members of the City Council of the City of Hawthorne, are enjoined from imposing as a condition to their approval of the change of zone and site development applications for the proposed Century Freeway replenishment rental development located at 14330 Cerise Avenue, Hawthorne, California, the requirement that not more

than 35% of the apartment units in the development be rented to low income persons.

2. The supplemental defendants are enjoined from refusing to approve the lot split, change of zone, and site development applications for the proposed Century Freeway replenishment rental development located at 1300-13001 Kornblum Avenue, Hawthorne, California.

3. The court shall retain continuing jurisdiction to implement and enforce the provisions of this Judgment.

4. This Memorandum and Order shall constitute the court's findings of fact and conclusions of law as authorized by Rule 52 of the Federal Rules of Civil Procedure.

The clerk of the court is requested to serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties herein.

Fed.R.Evid. 1006.

APPENDIX A (See note 27, page 1144.)

August 14, 1985

ORDER RE: ADMISSIBILITY OF EXHIBITS 44, 45, 46, 53, 54, 56, and 57

Exhibit 44 — Summary Report of Social Survey Conducted by Dr. James H. Johnson and Social Data Analysts

[17] To admit this summary report into evidence, the plaintiffs must not only comply with Fed.R.Evid. 1006, but also prove that the underlying survey is admissible. *See United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir.), *cert. denied*, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d

376 (1979). The court finds that they have met both of these requirements.

First, the plaintiffs have established that a summary is the appropriate way to present the survey data. Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place.

Fed.R.Evid. 1006.

The court cannot conveniently examine the 253 completed survey questionnaires and compute the percentages of the different responses to the 23 questions. The summary and charts in the report prepared by Dr. James H. Johnson, Assistant Professor at the Department of Geography, University of California at Los Angeles, are a necessary aid to interpreting the survey results. Because the plaintiffs provided the City of Hawthorne with the underlying documents — the completed survey questionnaires — Dr. Johnson's report is admissible under Rule 1006.

[18] Second, the court finds that the survey itself is admissible as an exception to the hearsay rule under Fed.R.Evid. 803(24). This "catch-all" exception provides that the following type of statement is not excluded by the hearsay rule, even though the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as

> evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed.R.Evid. 803(24).

The survey meets all of the conditions listed in exception 24. First, the survey results are evidence of facts material to the plaintiffs' allegations that Hawthorne's denial of the Kornblum Development applications and Hawthorne's imposition of a 35% quota on the number of low income tenants in the Cerise Development have an adverse racial and economic impact on the Century Freeway displacees.

Second, the survey is more probative on the issue of adverse impact that any other evidence which the plaintiffs could procure through reasonable efforts. The survey provides the most current information about the Hawthorne displacees. The 1980 U.S. Census data is five to six years old and the information in Caltrans's files is two to three years old.

Third, the general purposes of the rules of evidence and the interests of justice will best be served by admission of the survey into evidence. The rules of evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed.R.Evid. 102. Admission of the survey results eliminates the unjustifiable expense and delay of hearing every Hawthorne displacee's testimony concerning the relevant facts. Moreover, admission of surveys promotes

the development of the law of evidence because surveys are often the most expeditious way pertinent information may be ascertained and proceedings justly determined.

Fourth, the plaintiffs have established that the survey has equivalent circumstantial guarantees of trustworthiness. The survey meets the requirements for trustworthiness set forth in the Federal Judicial Center's *Manual for Complex Litigation* (5th ed. 1982) at 116:

(1) The proper universe was selected. The plaintiffs attempted to obtain information on all of the households currently located in the City of Hawthorne to be displaced by the continuing construction of the Freeway. Out of a total population of approximately 368 displacee households currently residing in Hawthorne, 181 were surveyed over the telephone and an additional 72 were surveyed in door-to-door interviews. Hawthorne's argument that plaintiffs should have also obtained information on Hawthorne displacees who have already moved from their Freeway-affected residences is meritless. The court must determine whether Hawthorne's actions regarding the Cerise and Kornblum Developments have an adverse impact on *current* Hawthorne residents, not on former Hawthorne residents. Moreover, it would be highly impracticable to track down the people who have moved outside the vicinity of Hawthorne.

(2) A representative sample was drawn. In this case, the plaintiffs attempted to obtain information on the entire universe. Therefore, the degree to which a sample represents the universe is not at issue.

(3) The mode of questioning the interviewees was correct. Dr. Johnson testified that he designed the questions to elicit the necessary information in as neutral a way as possible. Prior to conducting the survey, plaintiffs presented the questionnaire to Hawthorne, and Dr. Johnson modified the survey in response to

Hawthorne's concerns. *See Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir.1984) (survey admissible where proponent altered survey format in response to objector's criticisms). A simple reading of the questionnaire shows that there are no trick or misleading questions. *See James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 278 (7th Cir.1976) (survey admissible where questions "do not appear slanted or misleading").

Social Data Analysts, Inc., (SDA) the firm that conducted the telephone portion of the survey, "pre-tested" the questionnaire and determined that it was understandable before conducting the full survey. Dr. Johnson testified that SDA is experienced in conducting surveys of this type and that the interviewers were graduate students in social geography, trained to elicit accurate, scientific data rather than biased responses. Dr. Johnson also testified that he personally oriented Mr. Carl Goldstein, the man who conducted the door-to-door interviews, and was satisfied that Mr. Goldstein would administer the survey instrument in a neutral, scientific manner.

The court rejects Hawthorne's contention that testimony of the president of SDA and/or the individual interviewers in necessary to establish trustworthiness. A leading treatise discussing surveys as evidence states that there is

> no need to have anyone other than the survey director testify at trial to substantiate the survey results. The survey director testifies as an expert who has devised and conducted a scientific poll or survey. There should be no need for testimony from the actual interviewers. . . . Any doubts as to the accuracy of recorded responses can be dissipated by

verification checks which are common survey procedure.

2 J.T. McCarthy, *Trademarks and Unfair Competition* §32:53 at 782-83 (2d ed. 1984); *see also Piper Aircraft*, 741 F.2d at 931 (agrees with McCarthy that "the testimony of a survey director alone can establish the foundation for the admission of survey results").

(4) Dr. Johnson and Social Data Analysts are experts in the field of social research. Dr. Johnson's resume, exhibit 43, details his impressive qualifications. In addition, Dr. Johnson's testimony establishes the qualifications of SDA. Dr. Stephen Cole, president of SDA, has written one of the leading textbooks in the field of social geography. SDA has conducted more than 150 surveys in the last 12 years, is a member of the National Council on Public Opinion Polls, and adheres to the Code of Ethics of the American Association of Public Opinion Researchers. Finally, Dr. Johnson testified that Mr. Goldstein, who has also worked for the U.S. Census Bureau, has considerable experience in administering surveys.

(5) The data was gathered and reported accurately. Dr. Johnson testified that Dr. Cole gave the interviewers a three hour training session on administering the questionnaire so as to elicit accurate responses. As noted above, the interviewers need not testify to establish the accuracy of the surveying techniques; Dr. Johnson's testimony suffices. Because the questionnaire contained two questions on income, Johnson was able to test the responses for internal consistency and found that they were consistent. Moreover, a comparison of exhibit 45 (results of door-to-door survey only) and exhibit 57 (results of telephone survey only) demonstrates that the results of the telephone survey parallel those of the door-to-door survey and supports the conclusion that neither

SDA nor Mr. Goldstein gathered or reported the answers in a biased or inaccurate way.

(6) The questionnaire and interviewing were in accordance with generally accepted standards in the field. Dr. Johnson testified that the methods he and SDA employed in conducting the survey were accepted social science techniques.

(7) The survey was conducted independently from attorneys for plaintiffs and state intervenors. Dr. Johnson testified that he knew virtually nothing about the litigation and therefore could relay little, if any, information about it, to Dr. Cole or Mr. Goldstein.

In short, plaintiffs have made a sufficient showing on each of these seven factors to support the court's finding that the survey has equivalent circumstantial guarantees of trustworthiness, warranting its admission under Rule 803(24). Because that plaintiffs informed Hawthorne about the survey sufficiently in advance of the trial to provide Hawthorne with a fair opportunity to prepare to meet it, exhibit 44 is admitted into evidence.

Exhibits 53, 54, 56, and 57, whose admissibility hinges on the admission of exhibit 44, are also admitted.

Exhibit 45 — Summaries of Caltran's Current/Active files of Hawthorne Displacees.

After the court issued its order of May 24, 1985, requesting additional information,[51] the plaintiffs at-

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[51] On May 24, 1985, the court issued an order requesting the following information:

1. The racial composition of the Hawthorne displacees in each of the four census tracts affected by the freeway and of the residents in each of the two tracts in which the Cerise and Kornblum Developments are proposed to be built.
2. The percentage of Hawthorne displacee households in each of the four affected tracts that are low income households.

tempted to gather the requested information from Caltrans's files on forms called "summaries." Agents from Caltrans filled out a summary form for each Hawthorne displacees household, using information currently existing in the Caltrans file and information they personally knew about the displacees, but which was not recorded in the file. Agents from the Department of Housing and Community Development (HCD) then supplemented the incomplete summaries with information gained by telephone calls or personal interviews.

[19] To admit these summaries into evidence, the plaintiffs must satisfy Fed.R.Evid. 1006. They must also show that the information in the underlying files and the information added to each file's summary by memory, phone calls, or interviews after May 24, 1985, is admissible in evidence. *See United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir.), *cert. denied*, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 316 (1979). The court finds that the plaintiffs have met both requirements.

First, it would be inconvenient for the court to examine all of the relevant Caltrans files to glean out the pertinent information. The summaries are necessary to present clearly the relevant facts contained in each file. And although there was some dispute concerning plaintiffs' responsibility to make the underlying files available to Hawthorne at a reasonable time and place, Hawthorne now concedes that plaintiffs have satisfied that burden.

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3. The percentage of the low income Hawthorne displacee households in each of the four affected tracts that are minority households.

4. The percentage of low income Hawthorne displacee households in each of the four affected tracts that would desire to be relocated in a Century Freeway housing project in Hawthorne.

Therefore, exhibit 45 meets the requirements of Rule 1006.

[20] Second, the court finds that the information underlying the summaries is admissible under the public records exception to the hearsay rule. Rule 803(8)(C) provides that the following type of statement is not excluded by the hearsay rule, even though the declarant is available as a witness:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8)(C).

Hawthorne concedes that the information contained in Caltran's files before May 24, 1985, the data the court issued its order requesting additional information, fits within the exception. Hawthorne argues, however, that the additional information that Caltrans's right-of-way agents put in the summaries after May 24 based on their personal knowledge and the additional information that HCD agents added after May 24 based on their phone calls and interviews is inadmissible. Hawthorne contends that even though Caltrans and HCD agents normally gather such information, the additional information in this case was not obtained "from an investigation made pursuant to authority granted by law," Fed.R.Evid. 803(8)(C), because the information was granted as a result of the court's order.

The Ninth Circuit rejected a similar interpretation of the business records exception in *United States v. Baxter*, 492 F.2d 150, 163-65 (9th Cir.), *appeal dismissed*, 414 U.S.

801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). In *Baxter*, the government sought to introduce "customer books" that an informant prepared as part of the business of running a narcotics ring. The defendants contended that the books were inherently unreliable because the informant prepared them after he agreed to help the government. But the Ninth Circuit held that "the test is *not the motivation of the employee preparing the record, but the function served by the records in the operation itself.*" *Id.* at 165 (emphasis added). Because the ring-leaders continued to depend on the notebooks after the date on which the informant agreed to cooperate with the government, the court held that the entries were still made in the regular course of business and, as such, admissible. *Id.; see also Abdel v. United States*, 670 F.2d 73, 76 & n. 7 (7th Cir.1982) (because Food and Nutrition Service depended on accuracy of investigative reports for statistical and other non-litigation purposes, reports admissible as business records); *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157-58 (5th Cir.1972) (because EEOC investigative report was prepared in the regular course of business and pursuant to statutory authority, report admissible as business record).

Similarly, although Caltrans and HCD agents added information to the summaries in response to the court's request for additional information, it is the same type of information that Caltrans and HCD routinely gather in the regular course of business, pursuant to authority granted by law. Mr. James Dusini, Chief, California Department of Transportation Right of Way Relocation Assistance Program, testified that Caltrans regularly maintains this sort of data on the displacees, is presently putting the summaries in the files, and will rely on the information in the summaries to make future housing decisions. Mr. Boris Storzch from HCD and the Century

Freeway Housing Program (CFHP) testified that CFHP will also use the information contained in the summaries to implement its relocation housing programs. Because the agencies involved routinely gather this type of information in the course of performing their functions and will rely on the information gathered in response to the court's order, the court finds that exhibit 45 contains sufficient guarantees of trustworthiness to be admitted under Rule 803(8)(C).

Exhibit 46 is a series of charts summarizing the results of the numerous separate summaries on individual Hawthorne displacee households contained in Exhibit 45. Exhibit 46's admissibility thus depends on the admissibility of Exhibit 45. Therefore, Exhibit 46 is also admitted.

APPENDIX B

APPENDIX B

Ralph W. KEITH, et al.,
Plaintiffs-Appellees,

v.

John A. VOLPE, as Secretary of Transportation, et al.,
Defendants.

Earl WRIGHT, et al., Plaintiffs/Appellees on Supplemental Complaint, California Department of Housing and Community Development, et al., Intervenors/Appellees on Supplemental Complaint.

v.

CITY OF HAWTHORNE, et al.,
Defendants/Appellants on Supplemental Complaint

No. 85-6363.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 8, 1987.
Decided Sept. 19,1988.

Individuals and organizations brought action against city based on city's refusal to approve construction of housing for low and moderate income residents displaced by freeway construction. The United States District Court for the Central District of California, Harry Pregerson, Circuit Judge, sitting by designation, 644 F.Supp. 1317, determined that prima facie case of race

discrimination was established and awarded attorney's fees and costs to prevailing parties and city appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) residents were properly permitted to file supplemental complaints; (2) parties had standing to bring action; (3) city violated Fair Housing Act and state statute prohibiting discrimination on basis of race or income; and (4) resident who commenced action was entitled to attorney's fees and costs under both federal and state statute.

Affirmed.

William A. Norris, Circuit Judge, filed dissenting opinion.

(§§§= West Key Number System)

1. Federal Courts §§§ 817

Appellate court reviews for abuse of discretion district court's decision to grant leave to file supplemental pleading.

2. Federal Civic Procedure §§§ 866

Rule providing for filing of supplemental complaint does not contain transactional test; while some relationship must exist between newly alleged matters and subject of original action, they need not all arise out of same transaction. Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

3. Federal Civil Procedure §§§ 863

For purposes of determining whether litigants representing persons displaced from housing due to construc-

tion of freeway were entitled to file supplemental complaint against city, there was adequate relationship between claims in current action and claims in original action; focal point of original proceeding was provision of adequate replacement housing and supplemental action involved city's refusal to approve housing developments specifically meant to provide replacement housing for displacees. Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

4. Federal Civil Procedure §§§ 863

To evaluate whether district court abused its discretion in permitting supplemental pleading, appellate court looks to situation as it existed at time supplemental pleading was allowed. Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

5. Federal Civil Procedure §§§ 894

District court's decision to permit organizations representing persons displaced from housing due to freeway construction to file supplemental complaint did not result in prejudice to city which refused to approve housing development specifically meant to provide replacement housing for displacees and was not improper despite city's claim of district judge's alleged bias; city did not contend that alleged bias amounted to judicial misconduct nor did they request that district judge disqualify himself. Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

6. Federal Civil Procedure §§§ 864

Decision to permit filing of supplemental complaint against city by organizations representing persons displaced from housing by construction of freeway after

city refused to approve housing project designed to accommodate displacees was not improper on basis that city was not one of original defendants; new defendants may be added in supplemental complaint, and further, city was party to litigation for years but merely shifted from plaintiff to defendant. Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

7. Civil Rights §§§ 13.6

Individuals had standing to bring supplemental action against city for discrimination under Fair Housing Act; individuals testified that they lived in city, that they would be displaced as result of construction of freeway, that they would apply to live at proposed development which city refused to approve and that they were eligible to live in proposed project. Civil Rights Act of 1968, §804(a), 42 U.S.C.A §3604(a).

8. Federal Civil Procedure §§§ 315

In order for intervenors to have standing to assert other than federal claims, they must assert their own rights and not those of third party, their injury may not be generalized grievance shared in substantially equal measure by all or large class of citizens, and their interest must arguably be within zone of interest protected by statute in question.

9. Zoning and Planning §§§ 751

Project developer and state housing department had standing to maintain state law causes of action against city which refused to approve housing project for low and moderate income families displaced by construction of freeway; actions injured intervenors through delay and

added expense, time and resources were invested in project and injuries were within zone of interests protected by Government Code, West's Ann.Cal.Gov.Code §65008.

10. Federal Civil Procedure §§§ 2016

Reopening of trial for further evidence is within discretion of trial court; evidence requested should both be important as matter preventing injustice and reasonably be available.

11. Federal Civil Procedure §§§ 2016

Reopening of evidentiary hearing to permit presentation of statistical testimony regarding census data in action brought against city by advocates of low and moderate income persons displaced by construction of freeway based on city's refusal to approve housing development was not improper; there was no evidence that judge was biased against city and census evidence previously available was not up to date.

12. Evidence §§§ 150

Proponent seeking to have survey admitted into evidence must demonstrate that survey was conducted in accordance with generally accepted survey principles and that results were used in statistically correct manner.

13. Evidence §§§ 150

Technical inadequacies in survey sought to be introduced into evidence, including format of questions or manner in which it was taken, bear on weight of evidence rather than its admissibility.

14. Evidence §§§ 150

Survey of persons displaced by freeway construction who were currently living in city regarding their anticipated use of proposed housing projects for low and moderate income people was properly admitted in challenge to city's refusal to approve housing project; previous information was less trustworthy based on age, proper universe of displacees were interviewed, and methods used were accepted social science techniques in accord with generally accepted standards in field.

15. Evidence §§§ 333(1)

Summary of information contained in Department of Transportation's files in regard to displacement of persons upon construction of freeway was properly admitted in challenge to city's refusal to approve housing development project for low and moderate income persons; supplemental information was routinely gathered in regular course of business under authority granted by law and thus, evidence met public records exception to rule against hearsay. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, §101, 42 U.S.C.A. §4601; West's Ann.Cal.Str. & H.Code §§135.3, 135.5; Fed.Rules Evid.Rule 803(8)(c), 28 U.S.C.A.

16. Civil Rights §§§ 13.7

Fair Housing Act applies to municipalities. Civil Rights Act of 1968, §804(a), 42 U.S.C.A. §3604(a).

17. Civil Rights §§§ 13.13(3)

To establish prima facie case of withholding of housing for unlawful reasons under Fair Housing Act, plaintiff

must show at least that defendant's actions had discriminatory effect. Civil Rights Act of 1968, §804(a), 42 U.S.C.A. §3604(a).

18. Civil Rights §§§ 11.5

District court's finding that city's refusal to approve housing development for low and moderate income persons had discriminatory effect in violation of Fair Housing Act was based on appropriate population of current city freeway displaces and thus was valid, despite city's claim that population evaluated should have included all persons eligible to reside in housing project regardless of whether they were city residents or displaced by freeway construction; city displacees had priority in rental and thus in reality, only those households would have opportunity to live in units. Civil Rights Act of 1968, § 804(a), 42 U.S.C.A. §3604(a).

19. Civil Rights §§§ 13.13(3)

Evidence established that city's refusal to permit construction of housing project for low and moderate income freeway displacees had greater adverse impact on minorities and thus had racially discriminatory effect in violation of Fair Housing Act; of persons who would benefit from state-assisted housing on basis of status as low income displacees, two thirds were minorities. Civil Rights Act of 1968, §804(a), 42 U.S.C.A. §3604(a).

20. Civil Rights §§§ 11.5

City's preferred justifications for refusal to approve construction of housing project for low and moderate income persons displaced by freeway construction, which violated Fair Housing Act, were pretextual; city did not

have previous policy of dispersing low income tenants, and had approved developments in other areas where schools were equally crowded. Civil Rights Act of 1968, §804(a), 42 U.S.C.A. §3604(a).

21. Civil Rights §§§ 11.5

Proof of violation of state statute which prohibited discrimination in housing on basis of race or income was made on same basis as proof of federal Fair Housing Act violation; provisions served same purpose and contained similar language in describing prohibited type of housing discrimination. Civil Rights Act of 1968, §3604; West's Ann.Cal.Gov.Code § 65008(a-c).

22. Civil Rights §§§ 11.5

In order to establish violation of state statute prohibiting discrimination against statute prohibiting discrimination against individuals or housing development based on residents' low or moderate income status, proof of discriminatory intent is unnecessary. West's Ann.Cal.Gov.Code §65008(a-c).

23. Civil Rights §§§ 11.5

City's refusal to permit construction of housing development for low and moderate income persons displaced by construction of freeway violated state statute prohibiting discrimination against individual or housing developments based on residents' low or moderate income status; most residents who would be displaced by freeway were from low income households, and there was insufficient existing or planned low income housing in city to house displacees and thus, denial of construction which had great effect on low income

persons would have little if any effect on wealthier individuals. West's Ann.Cal.Gov.Code § 65008(c).

24. Civil Rights §§§ 13.17(10)

Low income persons who successfully litigated Fair Housing Act claim were entitled to attorney fees and costs from city which refused to approve construction of housing project for low and moderate income residents displaced by freeway construction. Civil Rights Act of 1968, §§§ 812(c), 42 U.S.C.A. §§§ 3612(c).

25. Civil Rights §§§73

Low income city resident who successfully demonstrated that city violated state statute prohibiting discrimination against residents on basis of income was entitled to attorney fees and costs under statute which codified private attorney general doctrine; by successfully litigating state law claims, resident enforced important rights affecting public interest which enabled large number of city displacees to find affordable housing and further, resident was required to bring action personally given failure of governmental agencies to protect resident's rights. West's Ann.Cal.C.C.P. §1021.5.

Richard Tervian, Adams, Duque & Hazeline, Los Angeles, Cal., for defendants-appellants.

Bill Lee and Carrie Hempel, Center for Law in the Public Interest, Los Angeles, Cal., for plaintiffs-appellees.

John K. Van de Kamp, Atty. Gen. of State of Cal., Sylvia Cano Hale, Deputy Atty. Gen., Los Angeles, Cal., for intervenors- appellees.

Appeal from the United States District Court for the Central District of California.

Before SCHROEDER, NELSON and NORRIS, Circuit Judge:

INTRODUCTION

Individuals and groups concerned about the dislocation of people living in the path of a planned freeway in the Los Angeles area filed this action in 1972. They sued various state and federal agencies responsible for the freeway's construction and funding. Their complaint sought injunctive relief to halt construction of the freeway until the agencies made binding assurances that they would comply with state and federal laws designed to protect the environment, assure the availability of replacement housing for displaced residents, and eliminate discrimination against minority and poor persons seeking replacement housing.

After years of litigious skirmishing, the parties in 1981 entered into a consent decree setting forth the defendants' obligations. For purposes relevant to this appeal, those obligations included specific commitments to provide units of replacement housing for low and moderate income households. The district court approved the decree and dissolved the injunction, but retained jurisdiction to ensure that the terms of the agreement were fulfilled. Fulfilling the agreement's terms obviously required the cooperation of the municipalities located in the freeway's path, including the appellant City of Hawthorne. At the time the 1981 decree was entered, Hawthorne was a plaintiff in the action.

The present phase of litigation began in 1985 when some of the original plaintiffs and other individuals sought injunctive relief against the City of Hawthorne

("City") by means of a "supplemental complaint" in the original proceeding. The City of Hawthorne and its officials had refused approval of certain housing developments. Plaintiffs alleged that this action resulted in unlawful discrimination against minority and low-income persons displaced by the freeway construction. The district court permitted the supplemental complaint, and after conducting evidentiary proceedings, enjoined the City from prohibiting constructions of the units. *Keith v. Volpe*, 618 F.Supp. 1132, 1160 (C.D.Cal.1985). It then awarded attorney's fees and costs to the plaintiffs. *Keith v. Volpe*,644 F.Supp. 1317, 1327 (C.D.Cal.1986).

The City of Hawthorne, Hawthorne's City Council, and five councilmembers ("Hawthorne") appeal. Hawthorne challenges plaintiffs' standing, the district court's evidentiary rulings, the sufficiency of the evidence, and the award of fees and costs.

The most significant legal issue is a threshold procedural one. It is whether the district court erred in permitting the plaintiffs to proceed in 1985 by means of a supplemental complaint in the original proceeding. The appellants maintain that the district court should have denied leave to file the supplemental complaint. The case would then have come before a different judge, one with no prior involvement in the litigation and one not familiar with the events leading to the consent decree. We hold that allowing the supplemental complaint was well within the district court's discretion under Fed.R.Civ.P. 15(d), which is designed to permit expansion of the scope of existing litigation to include events that occur after the filing of the original complaint. We affirm.

BACKGROUND

This action began on February. 16, 1972, when Ralph W. Keith and other individuals living in the path of the

proposed Century Freeway, together with the Los Angeles Chapter of the National Association for the Advancement of Colored People (NAACP), the Sierra Club, the Environmental Defense Fund, and the Freeway Fighters filed and environmental and civil rights complaint in district court against various state and federal agencies and officials. The complaint sought injunctive relief to have construction of the freeway until the defendants complied with state and federal environmental, civil rights, and housing laws to provide replacement housing for displaced residents without discrimination against minority and poor persons. *Keith*, 618 F.Supp. at 1137. The original defendants were the Secretary of the United States Department of Transportation, the Region 7 Administrator of the Federal Highway Administration, the United States Department of Transportation, the Federal Highway Administration, the Division Engineer of the Federal Highway Administration and the United States Department of Transportation, the California Highway Commission, the California Department of Public Works, the Director of the California Department of Public Works, and the California State Highway Engineer. In April 1972, the plaintiffs amended their complaint to include as an additional plaintiff the City of Hawthorne, one of the cities through which the proposed freeway would pass.

On July. 7, 1972, the district court issued a preliminary injunction prohibiting further work on the freeway until federal and state officials complied with the environmental and relocation assistance statutes. *Keith v. Volpe*,352 F.Supp. 1324 (C.D.Cal.1972), *aff'd en banc sub nom, Keith v. California Highway Commission*, 506 F.2d 696 (9th Cir.1974), *cert. denied*, 420 U.S. 908, 95 S.Ct. 826, 42 L.Ed.2d 837 (1975).

After years of negotiations, the parties entered into a consent decree, which the district court approved on

September. 22, 1981. Under paragraphs VI and VIII of the decree, the district court retained jurisdiction to enforce or amend the decree until it entered a judgment of dismissal upon the parties' compliance with the decree's terms. The court then dissolved the preliminary injunction, thus permitting further work on the freeway project pursuant to the decree's provisions. The decree remains in effect.

One of the purposes of the consent decree was "to provide for the housing needs of those living in the area of the proposed path of the freeway." Specifically, the decree required the defendants to provide displacees with 3700 units of replenishment housing under its "Housing Plan." Under the Plan's terms, 55 percent of all replacement units would be affordable to low- income housing and 25 percent would be affordable to moderate-income households.

The current phase of the litigation concerns the proposed construction of two housing developments, the Cerise and Kornblum projects, in the City of Hawthorne. These developments would provide approximately 128 rental units. Because the Cerise project has since been abandoned and any issue concerning it is moot, we are concerned only with the Kornblum Development, a proposed 96-unit apartment complex.

The California Department of Housing and Community Development(HCD), which the consent decree designated as the agency responsible for the coordination and implementation of the Housing Plan, agreed to fund the Kornblum project pursuant to the constant decree. Kornblum's developer then applied to the Hawthorne Planning Department for a lot split, a zoning change, and a site development permit. The Planning Department recommended approval of the Kornblum Development subject to a covenant imposing a 35 percent ceiling on

low-income occupants. After a public hearing, the Planning Commission voted to deny the developer's applications. The developer appealed the Planning Commission's decision to the City Council.

On November. 13, 1985, the City Council held a public hearing, during which several local residents voiced their opposition to the Kornblum project. Residents expressed concern that the project would lead to increased crime and traffic, overcrowded schools, and lost taxes for the City. They also expressed opposition to having low-income families reside in their neighborhood. The council voted to deny the applications. It apparently did not discuss suitability or consider any alternatives to the project that would provide housing to poor and minority persons displaced by the freeway. *See* 618 F.Supp. at 1142.

On February. 7, 1975, Keith and other Century Freeway plaintiffs, with the exception of Hawthorne, moved for a preliminary injunction and for leave to file a supplemental complaint against the City of Hawthorne and city officials. The supplemental complaint alleged violations of the Supremacy Clause. the Fair Housing Act, 42 U.S.C. §§3601-3631 (1982), the Fourteenth Amendment, Cal.Gov't Code §65008 (West Supp.1988), and the Equal Protection Clause of California's Constitution. The allegations stated various claims of the violation of federal and state laws prohibiting racial and economic discrimination.

Keith sought injunctive and declaratory relief based on Hawthorne's refusal to permit the construction of the Kornblum project and the City's imposition of a 35 percent low-income covenant on the Cerise project. On April. 10, 1985, the district court granted Keith leave to file the supplemental complaint. The court also permitted HCD, the California Department of Transportation

("Caltrans"), and the Kornblum project developers to intervene.

Under Fed.R.Civ.P 65(a)(2), the parties agreed to advance the trial on the merits and consolidate it with the preliminary injunction hearing. At a bench trial on April. 17, 1985, the parties submitted their evidence in the form of documents and declarations. The parties were represented by counsel and addressed the court as to each of the causes of action. Plaintiffs contended they had established a prima facie case of discrimination and argued that the defendants' proffered justifications were pretextual; defendants contended that they were entitled to disperse low-income households under the zoning laws and that the denial of the Kornblum project application was motivated by considerations of the impact on the community rather than discriminatory animus.

Soon after the one-day trial, the district court reopened the proceedings by asking the parties to provide additional information on the racial and economic composition of the relevant Hawthorne tracts and to brief the issue of plaintiffs' and intervenors' standing to sue. The standing issue apparently concerned the ability of the NAACP to represent the interests of the minority displacees.

During an evidentiary hearing on May 23, 1985, the court suggested that plaintiffs conduct a survey concerning the racial and economic status of the affected communities. In response, plaintiffs introduced additional evidence, including a door-to- door and telephone survey of Hawthorne residents residing in the relevant census tracts, information contained in Caltrans files which included information on the displacees' race, income, and housing preferences, and a summary of the Caltrans information in chart form.

On July. 24, 1985, the court granted plaintiffs' motion to add three additional plaintiffs who were low-income minority Hawthorne residents living in the path of the freeway. On July. 30, the court admitted into evidence the survey, the Caltrans file summary, and the charts.

On September. 3, 1985, the court held that the plaintiffs and intervenors had standing to bring the action. *Keith*, 618 F.Supp. at 1145-1147. The court then determined that plaintiffs had established a prima facie case of race discrimination under the Fair Housing Act and that Hawthorne had failed to show nondiscriminatory reasons for its actions. *Id.* at 1157. The court also determined that plaintiffs were entitled to relief under Cal.Gov't Code §65008 for discrimination based on race and income. *Id.* at 1158- 1160. Accordingly, the court issued a final order enjoining Hawthorne from prohibiting the construction of the two housing projects. *Id.* at 1160. In subsequent published opinion issued August. 26, 1986, the district court determined that, as prevailing parties, plaintiffs were entitled to attorney's fees and costs pursuant to 42 U.S.C. §3612(c) and Cal.Code Civ.Proc. §1021.5. *Keith* 644 F.Supp. at 1320-22.

Hawthorne timely appeals the judgment on the merits and the subsequent attorney's fees award.

DISCUSSION

A. Leave to File Supplemental Complaint

[1] Hawthorne challenges the district court's decision to permit the filing of a supplemental complaint. The court's ruling had the effect of keeping this proceeding before the same district judge who had presided over earlier phases of the freeway controversy. Rule 15, Fed.R.Civ.P., authorizes supplemental complaints for

such a purpose. It provides that "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrence or events which have happened since the date of the pleading sought to be supplemented." Fed.R.Civ.P. 15(d). This court reviews for abuse of discretion a district court's decision to grant leave to file a supplemental pleading. *See United States ex rel. Atkins v. Reiten*, 313 F.2d 673, 675 (9th Cir.1963); *see also Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1193 (5th Cir.1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1245, 75 L.Ed.2d 476 (1983).

Rule 15(d) is intended to give district courts broad discretion in allowing supplemental pleadings. Fed.R.Civ.P. 15, advisory committee's note. The rule is a tool of judicial economy and convience. Its use is therefore favored. As Judge Haynsworth observed more than two decades ago:

> Rule 15(d) of the Federal Rules of Civil Procedure provides for . . . supplemental pleading. It is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears, thought the court has the unquestioned right to impose terms upon their allowance when fairness appears to require them.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 28-29 (4th Cir.1963). *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed. 2d 981 (1964).

In this case, Hawthorne first challenges the supplemental complaint as an abuse of discretion because it raises new claims. The clear weight of authority, however, in both cases and the commentary, permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1057 (9th Cir.1982) ("The purpose of Rule 15(d) is to promote as complete and adjudication of the dispute between the parties as possible by allowing the addition of claims which aries after the initial pleadings are filed."); *Rowe v. United States Fidelity & Guaranty Co.*, 421 F.2d 937 (4th Cir.1970) (reversing district court's refusal to permit filing of supplemental complaint because no prejudice from such a filing had been shown); *see also Reiten*, 313 F.2d at 675; *H.F.G. Co. v. Pioneer Publishing Co.*, 7 F.D.R. 654, 656 (N.D.Ill.1947) (permitting supplemental complaint stating new cause of action by a plaintiff acting in a new capacity); 3 J. Moore, *Moore's Federal Practice* ¶15.16[3] (1985); 6 C. Wright & A. Miller, *Federal Practice and Procedure* §1506 (1971).

Hawthorne points out that the supplemental complaint involves additional statutes and labels this a "new and distinct" action. It further asserts that the two pleadings do not "arise out of the same transaction or occurrence" nor involve "common questions of law or fact." Hawthorne seeks to build into Rule 15 requirements from other rules, such as the transactional test pertaining to compulsory counterclaims, Fed.R.Civ.P. 13(a).

[2] Rule 15(d), however, make no reference to any such test. The absence of a transactional test, which is an integral part of other Federal Rules of Civil Procedure, *see, e.g.*, Fed.R.Civ.P. 13(a), 14(a), and 20, is a strong indication that this test is not required. Further, Rule 15(d) specifically permits supplemental pleadings

"setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." This textually negates the argument that a transactional test is required. While some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction. Professor Moore has explained the principle succinctly:

> While the matters stated in a supplemental complaint should have some relation to the claim set forth in the original pleading, the fact that the supplemental pleading technically states a new cause of action should not be a bar to its allowance, but only a factor to be considered by the court in the exercise of its discretion, along with such factors as possible prejudice or laches.

3 J. Moore, *Moore's Federal Practice* ¶15.16[3] (1985).

[3] Here, there is clearly a relationship among the claims in this action and the claims in the original action. This action involves a city's refusal to approve housing developments specifically meant to provide replacement housing for the Century Freeway displacees. In the original action, plaintiffs alleged that the defendants had failed to meet federal statutory requirements concerning relocation payments, relocation assistance programs, and adequate replacement housing. The district court's published order devoted nearly five full pages to the issue of the availability of replacement housing. *Keith*, 352 F.Supp. at 1346-50.

In 1981, the parties entered into a consent decree setting forth the defendants' obligations. The decree creates an Office of the Advocate for Corridor Residents, whose responsibilities include monitoring defendants' compliance with federal and state regulations pertaining

to displacees' relocation rights and assisting displacees in obtaining adequate replacement housing.

Thus, it is clear that a focal point of the original proceedings was the provision of adequate replacement housing. Further, the district court specifically provided in the consent decree that it retained jurisdiction in the matter. Since the court expressly reserved its jurisdiction over later developments, an even stronger case is presented here for permitting a supplemental complaint than in *Griffin v. County School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964), where the Supreme Court approved a supplemental complaint after the district court had entered a final judgment.

The concern in the original action, the consent decree, and the supplemental complaint is the same-the availability of replacement housing for persons displaced by Century Freeway. The Fourth Circuit in *Rowe* also focused on the confluence of the actual objectives between the parties' original pleadings and the proposed supplemental filings. *See Rose*, 421 F.2d at 943-44. The United States Supreme Court has rejected the kinds of objections that Hawthorne urges in arguing that the supplemental complaint was improper. The Supreme Court has stated that new claims, new parties, and events occurring after the original action are all properly permitted under Fed.R.Civ.P. 15(d).

> It is contended that the amended supplemental complaint presented a new and different cause of action from that presented in the original complaint. The supplemental pleading did add new parties and rely in good part on transactions, occurrences, and events which had happened since the action had begun. But these new transactions were alleged to have occurred as a part of continued, persistent efforts to circumvent our 1955 holding that Prince

> Edward County could not continue to operate, maintain, and support a system of schools in which students were segregated on a racial basis. The original complaint had challenged racial segregation in schools which were admittedly public. The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools, all to avoid the desegregation ordered in the Brown cases. The amended complaint thus was not a new cause of action but merely part of the same old cause of action arising out of the continued desire of colored students in Prince Edward County to have the same opportunity for state-supported education afforded to white people, a desire thwarted before 1959 by segregation in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children at the Foundation's private schools. Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justices.

Griffin, 377 U.S. at 226-27, 84 S.Ct. at 1231.

Lower courts have similarly stressed the trial court's discretion in deciding whether to allow a supplemental pleading, and liberally construe Rule 15(d) absent a showing of prejudice to the defendant. *See, e.g., Lerman v. Chuckleberry Publishing, Inc.*, 521 F.Supp. 228, 231-32 (S.D.N.Y.1981) (noting that court has discretion to permit supplemental pleading when to do so will promote speedy disposition of the entire controversy, will not

cause undue delay, and will not prejudice other parties' rights); *Vernay Laboratories, Inc. v. industrial Electronic Rubber Co.*, 234 F.Supp. 161, 166-67 (N.D.Ohio 1964) (noting that motions for supplemental complaints are treated liberally in patent cases and that defendant had demonstrated no prejudice); *H.F.G.*, 7 F.R.D. at 656 (" The Federal Rules of Civil Procedure were designed to simplify judicial procedure, to adjudicate all phases of litigation involving the same parties, and to avoid multiplicity of suits. These rules must be liberally construed to give vent to the objectives which prompted their promulgation. A strict interpretation of Rule 15(d) would emphasize the formality of pleading over substance"); *Fotomat Corp. v. Interstate Mail Film Serv., Inc.*, 15 Fed.Rules Serv.2d 614, 615 (N.D.Ind.1971) (rejecting contention that prejudice resulted from delay or further discovery in light of "overriding concern for the economical and speedy disposition of this entire controversy"); *see also Reiten*, 313 F.2d at 675 ("there is no reason to read into Rule 15(d) an inflexible limitation upon the broad power vested in the District Court to permit supplemental pleading. Under the Rule, allowance or denial of leave to file a supplemental pleading is addressed to the sound discretion of the District Court. . . . This interpretation of Rule 15(d) is supported by the general purpose of the Rules to minimize technical obstacles to a determination of the controversy on its merits").

[4,5] The only prejudice alleged by appellants is an after- the-fact conclusion that the district judge was biased against them. They do not, however, contend that the district judge's alleged bias amounted to judicial misconduct requiring reversal. Nor do they point to any conduct of the court in earlier stages of this litigation suggesting bias with respect to Hawthorne. Hawthorne never requested that the district judge disqualify himself.

To evaluate whether a district court abused its discretion in permitting a supplemental pleading we must look to the situation as it existed at the time the supplemental pleading was allowed. *See Hasbrouck v. Texaaco, Inc.*, 830 F.2d 1513, 1524 (9th Cir.1987) ("bias must stem from an extrajudicial source and not be based solely on information gained in the course of the proceedings"). We should not look to the speculations of those who subsequently did not prevail about what might have occurred before a different judge.

[6] Finally, Hawthorne argues that the supplemental complaint was improper because Hawthorne was not one of the original defendants. It contends that there is no authority for permitting supplemental complaints unless filed by the original plaintiff against an original defendant.

Hawthorne relies on cases in which the original plaintiff sought to file a supplemental complaint against an original defendant. *See, e.g., Case-Swayze Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir.), *rev'd on other grounds*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed2d 621 (1967); *Adams County v. Norther Pacific R.R. Co.*, 115 F.2d 768 (9th Cir.1940). However, the case law does not hold that a new defendant cannot be sued in a supplemental complaint. On the contrary, there is ample authority for adding new defendants in a supplemental complaint. The Supreme Court has expressly approved the addition of new parties under the Rule: "[Fed.R.Civ.P. 15(d)] plainly permits supplemental amendments to cover events happening after suit, and it follows, of court, that persons participating in these new events may be added if necessary." *Griffin*, 377 U.S. at 227, 84 S.Ct. at 1231; *see also Corum b. Beth Israel Medical Center*, 359 F.Supp. 909, 912-13 (S.D.N.Y.1973) (permitting second supplemental complaint adding twelve defendants because "ultimate aim" of causes of action the same); *Poindexter v.*

Louisiana Financial Assistance Commission, 296 F.Supp. 686, 688-89 (E.D.La) (permitting supplemental complaint adding new defendants after entry of final decree in original cause where district court explicitly retained jurisdiction), *aff'd sub nom., Louisiana Educ. Comm'n for Needy Children v. Poindexter*, 393 U.S. 17, 89 S.Ct. 48, 21 L.Ed.2d 16 (1968); *United States v. National Screen Service Corp.*, 20 F.D.R. 226, 227 (S.D.N.Y.1957) (permitting supplemental complaint adding two defendants citing Rule 15(d) as authority.)

Moreover, in this case Hawthorne has been a party to the litigation for years. Hawthorne has merely shifted from plaintiff to defendant. This shift does not require us to hold that the district court should have forced the plaintiffs to begin a new lawsuit. The shift is analogous to a realignment of the parties within ongoing litigation. We have held that the alignment of the parties as designated in the original complaint is not binding on the court. "The courts, not the parties, are responsible for aligning the parties according to their interest in the litigation." *Dolch v. United California Bank*, 702 Fd.2 178, 181 (9th Cir.1983), *see also Lowe v. Ingalls Shipbuilding*, Fd.2 1173, 1177-78 (5th Cir.1984); *Montgomery Environmental Coalition v. Fri*, 366 F.Supp. 261 (D.D.C.1973) (expressly permitting supplemental complaint alleging new claim after realigning of the parties.)

The interests of the judicial economy and the liberal interpretation of Rule 15(d) favor granting leave to file the supplemental complaint in this case. All involved-plaintiffs, defendants, and district court-were familiar with the underlying action. Thus, we hold that the district court did not abuse its discretion in permitting the supplemental complaint.

B. Standing.

The district court held that the individually named plaintiffs had standing to sue for discrimination under the Fair Housing Act 42, U.S.C. §§3601-3631. Those plaintiffs showed that they would be dislocated by the freeway and would like to rent an apartment in the development in question, a rental that is impossible because of the City's acts. Hawthorne nevertheless contends that the plaintiffs lack standing because they have not shown a sufficient "distinct and palpable injury . . . that is likely to be redressed if the requested relief is granted." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed2d 66 (1979), *quoting Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed2d 450 (1976).

[7] These plaintiffs testified that they lived in Hawthorne, that they would be displaced as a result of the construction of the Century Freeway, and that they would be apply to live at the proposed development. Moreover, evidence was introduced showing that all three individuals would be eligible to live in the project. The record reflects that Hawthorne's failure to approve the project caused them injury, the inability to live in the project, which the requested relief would redress. The *Simon* requirement is satisfied.

Hawthorne seeks to analogize the record in this case to that of a Sixth Circuit case, *Jaimes v. Toledo Metropolitan Housing Authority*, 758 Fd.2 1086 (6th Cir.1985), where plaintiffs expressed only a generalized desire to afford better housing outside the center of Toledo and alleged that the Housing Authority was not providing it. The record in this case is very different.

This case is therefore controlled by the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed2d 450 (1977), where the Court held that sufficient personal injuries for standing under the Fair Housing Act may be shown through discriminatory acts excluding low-income persons of a minority race from a specified housing project. In *Arlington Heights II*, the Court held that a black plaintiff who sought to live in a low-income housing project planned for the City of Arlington Heights has standing because "h[is] is not a generalized grievance. Instead . . . it focuses on a particular project and is not dependent on speculation about possible actions of third parties not before the court." *Id.* at 264, 97 S.Ct. at 563. Moreover, the Court noted that if relief were granted, there was a "substantial probability" that the project would be built and the plaintiff would be provided the housing he sought. *Id.* Therefore, the district court did not err in finding that plaintiffs Hillman, Wright, and Zapeta have standing to maintain this action.

The district court's decision is also in accord with decisions in other circuits. *See Resident Advisory Board v. Rizzo*, 564, Fd.2 126 (3d Cir.1977) (individual low-income plaintiffs had standing to maintain suit against Philadelphia for its failure to permit construction of a specific low-income housing project), *cert.denied*, 435 U.S. 908, 98 S.Ct. 1457, 1458, 55 L.Ed2d 499 (1978); *Smith v. Town of Clarkton*, 682 Fd.2 1055 (4th Cir.1982) (low-income black resident allowed to challenge town's decision not to build a particular project); *Silva v. East Providence Housing Authority*, 565 Fd.2 1217 (1st Cir.1977) (prospective tenants of development allowed to sue HUD to prevent project's termination.)

Hawthorne also challenges the standing of the developer- intervenor and the state intervenors, HDC and

Caltrans, to maintain the California state law causes of action. Hawthorne again contends that their has been no injury in fact.

The project developer satisfies the injury in fact requirement. Hawthorne's actions in denying the developer's applications constitute an absolute barrier to constructing the housing that the developer planned to build. If relief is granted, that barrier will be removed. *See Arlington Heights*, 429 U.S. at 261-62, 97 S.Ct. at 561-62.

Likewise, the state intervenors have also suffered injury. Under the consent decree, HCD has the responsibility for implementing the Housing Plan, and has provided financial assistance for the Kornblum project's construction. Caltrans has responsibility to aid in relocating the displacees and in, construction the Century Freeway. *See* Gov't Code § 14030; Cal.Sts. & High.Code §135.3. Clearly Hawthorne's actions have injured both agencies through delay and added expense to their programs. If relief is granted, the barriers to implementing their programs in Hawthorne will be eliminated. *See Arlington Heights*, 429 U.S. at 264, 97 S.Ct. at 562-63.

[8] The intervenors thus have satisfied the injury in fact requirement. However, because the intervenors assert claims other than federal claims, they must satisfy the prudential limitations on standing as well as the Article III minima. *See McMichael v. County of Napa*, 709 Fd.2 1268, 1270 (9th Cir.1983). These prudential limitations require that plaintiffs assert their own rights and not those of a third party; that their injury is not a "generalized grievance" shared in substantially equal measure by all or a large class of citizens; and finally, that their interest is arguably within the zone of interests protected by the statute in question. *Id.*

[9] The intervenors satisfy these prudential limitations. The developer has invested time and resources in this state- assisted low-income project, and thus is asserting its own interests in removing the barriers to construction, is not asserting a generalized grievance, and is within the zone of interests protected by Cal.Gov'tCode §65008. Section 65008 prohibits discrimination in housing on the basis of race or income, and specifically prohibits discrimination against residential developments on the basis of race or income of its intended occupants or because the development receives state assistance.[1] Cal.Gov't Code §65008 (West Supp.1988). Similarly, both HCD and Caltrans are asserting their own interests in carrying out their responsibilities to supply replenishment housing. The injury is not generalized but is exclusive to the two agencies, and both-as the agencies responsible for assisted relocation housing-are within the zone of

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[1] Section 65008 provides, in relevant part:

(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, lawful occupation, or age of the owners or intended occupants of the residential development or emergency shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income.

For the purposes of this section, "persons and families of middle income" means persons and families whose income does not exceed 150 percent of the median income for the county in which the persons or families reside.

Cal.Gov't Code §65008 (West Supp.1988)

interests protected in section 65008. Thus the individually named plaintiffs and the intervenors have standing to bring this action.

C. Reopening for Further Evidence

[10] This matter came before the district court for trial on April 17, 1985. The trial was concluded in one day. The court then requested post-trial briefs and took the matter under submission. During the month of May, the court sua sponte raised the issue of standing and reopened the evidentiary hearing to permit the plaintiffs to present statistical testimony, based on the fact that the census data introduced as evidence was nearly six years old. We have said that sua sponte reopening is unusual. *See Students of California School for the Blind V. Honig*, 763 Fd.2 538, 540 (9th Cir.1984), *vacated and remanded on other grounds*, 471 U,S, 148, 105 S.Ct. 1820, 85 L.Ed2d 114 (1985). However, we have held that such reopening is within the discretion of the trial court, noting that the evidence requested should both be important as a matter preventing injustice and reasonably be available. 736 Fd.2 at 548.

[11] Hawthorne argues that the reopening was improper, and again suggests bias on the part of the district judge in requesting additional evidence in the form of a survey. Hawthorne argues that the district judge never sought evidence supporting Hawthorne's position. Hawthorne apparently assumes that the judge had no way of knowing what the result of the survey would be. The record reflects that the judge requested the survey because he felt he needed more recent objective data in order to make an informed decision. The court expressed concern that because the racial composition of the area varied considerably over the years and submitted evidence was out of date, current evidence was necessary

to determine whether there was any discriminatory effect. The court's actions were well within the scope of discretion that we have repeatedly recognized in connection with reopenings. *See, e.g., School for the Blind,* 736 Fd.2 at 548; *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 685 Fd.2 1065, 1071 (9th Cur,1982); *Berns v. Pan American World Airways, Inc.,* 667Fd.2 826, 829 (9th Cir.1982).

In arguing that reopening was improper, Hawthorne relies upon *Arthur Murray, Inc. v. Oliver,* 364 Fd.2 28 (8th Cir.1966). In that case, the Eighth Circuit held that a district court abused its discretion by reopening an antitrust case, eighteen months after the parties had submitted their evidence, ro receive additional evidence regarding the plaintiff's lost profits. In *Arthur Murray,* it was clear that the record was sufficient to evaluate the case without the additional evidence and the long delay was inexplicable. In the case before us, the district court determined both that the additional evidence was necessary to achieve a just disposition and that it was reasonably available, and there was no delay.

Our holding that the district court did not abuse its discretion in this case is also in full accord with the Sixth Circuit's decision in *Calage v. University of Tennessee,* 544 Fd.2 297 (6th Cir.1976), which we cited and quoted with approval in *School for the Blind.* In *Calage,* a Title VII case, the district judge reopened the case sua sponte the day after the case was submitted, but before entry of judgment. The judge asked the University for further evidence what would explain why some exhibits showed disparities in the wages of men and women in comparable managerial positions. The University provided the information requested, and subsequently won the lawsuit. On appeal, the plaintiff argued that the judge's request was

> indicative of a determination by the court that at the time plaintiff had made a prima facie case entitling her to relief. Inferentially therefore, the court, harboring some predisposition in favor of the University, determined to give it a second chance to explain the disparities, a practice which plaintiff contents F.Supp. "did not comport with the interest of fairness and substantial justice."

544 Fd.2 at 301.

This is precisely the argument made by appellants in the case before us. The court in *Calage* rejected this argument, observing that there was no evidence that the judge was biased, and that "t[he] information sought here was readily available, and that the judge conceived that the justice of the case required that he have it." *Id.* at 301-02. For similar reasons, we find that the district court did not abuse its discretion in reopening the proceedings.

D. Admissibility of the Challenged Exhibits

The next issue is the admissibility of the exhibits offered following the reopening. The exhibits at issue on this appeal are Exhibits 44, 45, and 46. Exhibit 44 is a summary report of the social survey conducted by Dr. Johnson and Social Data Analysts. The report contained the percentages of the different responses to 23 questions contained in the survey questionnaire, which was completed by 253 respondents. The district court found the summary report "a necessary aid to interpreting the survey results," and therefore admissible under Fed.R.Evid. 1006. The court then went on to find the survey itself admissible as an exception to the hearsay rule under Fed.R.Evid. 803(24). *Keith*, 618 F.Supp. at 1161-63.

Exhibit 45 consists of summaries of Caltrans' files of Hawthorne displacees. Caltrans agents filled out forms called "summaries"

> for each Hawthorne displacee household, using information currently existing in the Caltrans file and information they personally knew about the displacees, but which was not recorded in the file. Agents from the Department of Housing and Community Development (HCD) then supplemented the incomplete summaries with information gained by telephone calls or personal interviews.

Id. at 1163. The district court found the summaries "necessary to present clearly the relevant facts contained in each file," and therefore admissible under Rule 1006, and also found the information underlying the summaries admissible under the public records exception to the hearsay rule, Rule 803(8)(C). *Id.* at 1164-65.

Finally, Exhibit 46, is a series of Charts summarizing Exhibit 45, the summaries of the individual displacees. The district court found that Exhibit 46's admissibility depended on the admissibility of Exhibit 45, and therefore admitted it into evidence. *Id.* at 1165. We separately address the admissibility of each questioned exhibit.

1. *Exhibit 44*

Hawthorne contends that the district court erred in admitting the Johnson survey on the grounds that it was neither necessary or trustworthy. *See Toys "R" Us, Inc. v. Canarsie Kiddie Shop,* 559 F.Supp. 1189, 1205 (E.D.N.Y.1983) (requiring necessity and "genuine guarantees of trustworthiness" to admit survey evidence). The proponent of the survey bears the burden of establishing its admissibility. *Pittsburgh Press Club v. United States,* 579 Fd.2 751, 758 (3d Cir.1978).

[12,13] The proponent must show that the survey was conducted in accordance with generally accepted survey principles and that the results were used in a statistically correct manner. *Baumholser v. Amax Coal Co.*, 630 Fd.2 550, 552 (7th Cir.1980). Technical inadequacies in the survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility. *Prudential Insurance Co. v. Gibralter Financial Corp.*, 694 Fd.2 1150, 1156 (9th Cir.1982), *cert. denied*, 463 U.S. 1208, 103 S.Ct. 3538, 77 Fd.2 1389 (1983); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 Fd.2 1049, 1055 n. 10 (5th Cir.) (per curiam), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed2d 112 (1981); *see also Piper Aircraft Corp. v. Wag-Aero, Inc., R741 Fd.2 925, 930-31 (7th Cir.1984).*

[14] Hawthorne first argues that the survey was not necessary because the court had other trustworthy data available in the form of the 1980 federal census and information from the Caltrans files. However, the 1980 federal census data was over five years old, and the information from the Caltrans files was over two years old. Therefore, the information in the survey was more probative of the current composition of the areas in question and thus much more probative on the issue of adverse impact. *See Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F.Supp. 670, 683 (S.D.N.Y.1963) (necessity requires a comparison of the probative value of the survey with the evidence that could be used if the survey were excluded). There was no other current evidence.

Hawthorne also contends that the survey should not have been admitted because an improper universe of respondents was surveys. The district court considered freeway displacees currently residing in Hawthorne as a proper universe, whereas Hawthorne argues that the universe surveyed should have included all persons

displaced by the freeway who were eligible to reside in the projects.

Essentially Hawthorne argues that the group surveyed was too narrow. Hawthorne's definition of the proper universe encompasses all persons displaced, including former Hawthorne displacees who have already relocated. However, because relocated individuals by definition have already found alternative housing, their inclusion appears unnecessary and aimed solely at reducing the percentage who would indicate interest in living at the proposed projects. The universe proposed by Hawthorne does not appear to be more appropriate than the one the district court considered.

Hawthorne's remaining methodology challenges are also without merit. Hawthorne contests the survey's general trustworthiness, the clarity of the survey questions, the qualifications of the interviewers, and the objectivity of the survey. The testimony of Dr. James Johnson, the survey director, established that the methods used were accepted social science techniques in accord with generally accepted standards in the field. *See Baumholser*, 630 F.2d at 552. Dr. Johnson testified that he was able to verify the trustworthiness of the responses by comparing for internal consistency two of the questions concerning income. 618 F.Supp. at 1163. He also testified about the survey's objectivity and the qualifications of the firms engaged to conduct the survey. The district court did not err in relying upon this reasoning to support admission of the survey into evidence. *See Debra Pl v. Turlington*, 730 F.2d 1405, 1413 (11th Cir.1984) (where survey director testified that steps were taken to insure survey's trustworthiness and objectivity, court was within its discretion to admit survey as evidence.)

Finally, Hawthorne contends that Johnson's testimony was insufficient to establish the foundation for the

survey's admission. Yet his testimony establishes that he functioned as the survey director, even though he contracted with another firm to provide interviewers for the telephone survey. The testimony of the survey director alone is sufficient to establish a foundation. *See Piper Aircraft*, 741 F.2d at 931. The district court was within its discretion in admitting the survey as evidence.

2. Exhibit 45 and 46

[15] Hawthorne also contends that the district court abused its discretion in admitting Exhibit 45, a summary of information contained in Caltrans files, and Exhibit 46, the summaries of Exhibit 45 set forth in chart form. Hawthorne argues that because the files were supplemented with information gathered solely for the purposes of this lawsuit, the file summary fails to fall within the public records exception to the hearsay rule.

Fed.R.Evid. 803(8)(C) excludes from hearsay public records and reports "in civil actions and proceedings . . . [setting forth] factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness, with the burden of establishing untrustworthiness on the opponent of the evidence. *See* Fed.R.Evid. 803(8)(C).

The evidence admitted here is a summary of forms completed by Caltrans agents, in response to the court's order of May. 24, 1985, requesting additional information on each Hawthorne displacee household. The agents used information already contained in the files and information in their personal knowledge. State Housing Department agents supplemented incomplete summaries with information they obtained through personal interviews or telephone calls.

Hawthorne argues that Caltrans was not required to maintain information on the displacees' relocation preference, so that the data compiled regarding this preference was not the result of an investigation made pursuant to authority granted by law. The City argues that this material serves no function other than for purposes of litigation and thus falls outside the public records hearsay exception. *See United States v. Baxter,* 492 F.2d 150, 165 (9th Cir.1973) (records must serve a function beyond the litigation), *cert. denied,* 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed2d 292 (1974); *see Abdel v. United States,* 670 F.2d 73 (7th Cir.1982). Hawthorne points to the testimony of the Caltrans representative, James Dusini, who stated that Caltrans agents were not required to obtain information about relocation preferences. However, there is no reason to distinguish between records prepared before initiation of litigation and those prepared during the litigation, so long as the records meet the test set out in *Baxter;* that the records serve a function beyond the litigation.

The records here fulfill the *Baxter* requirements. Dusini testified that information about whether the displacees wanted to stay in the same neighborhood was routinely gathered. He testified that although there was no requirement that this information be retained in the files for reporting purposes, Caltrans used it to help the relocations department. Dusini also testified that in 1981-82, Caltrans obtained similar information through a survey it conducted to help with the relocation. It thus appears that Caltrans routinely collected this kind of information, and that such information was not used solely for litigation purposes.

Moreover, it appears that federal and state law requires Caltrans to keep similar data to verify compliance with federal relocation benefits requirements and to determine eligibility for such benefits. *See* Uniform Relocation

Assistance and Real Property Act, 42 U.S.C. §4601; 49 C.F.R. § §25.9, 25.206; 23 C.F.R. §740; *see also* Cal.Sts. & High.Code §§135.3, 135.5. Therefore, the district court could reasonably conclude that the supplemental information was routinely gathered in the regular course of business under authority granted by law. This evidence adequately meets the public records exception and the court did not abuse its discretion in admitting Exhibit 45 and 46 into evidence under Fed.R.Evid. 803(8)(c).

E. Fair Housing Act

Hawthorne contends that the district court erred in holding that the City violated the federal Fair Housing Act, 42 U.S.C. §§3601-3631. The court found that because the City's actions had a greater adverse impact on minorities than whites, this demonstrated a discriminatory effect, and thus the plaintiffs had shown a prima facie case of discrimination under the Act. The court then found that the City's proffered justifications were pretextual and so held that Hawthorne had violated the Act.

[16,17] Under the Fair Housing Act it is unlawful for a person to "make unavailable . . . a dwelling to any person because of race, color, religion, sec, or national origin." 42 U.S.C. §3604(a). The Act applies to municipalities. *United States v. City of Parma, 661 F.2d 562,572 (6th Cir.1981), cert. denied,* 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed2d 441 (1982)/ To establish a prima facie case of withholding of housing for an unlawful reason under the Act, a plaintiff must show at least that the defendant's actions had a discriminatory effect. *See Smith,* 682 F.2d at 1065; F.2d Resident Advisory Bd., 564 F.2d at 146-48; *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283, 1289-90 (7th Cir.1977), *cert. denied,* 434 U.S. 1025,98 S.Ct. 752,54 L.Ed2d 772

(1978) (*Arlington Heights II*); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir.1974), *cert. denied*, 422 U.S. 1042,95 S.Ct. 2656,45 L.Ed2d 694 (1975), Discriminatory effect means that "the conduct of the defendant actually or predictably results in racial discrimination . . . . The plaintiff need make no showing whatsoever that the action resulting in racial discrimination . . . was racially motivated." *Black Jack* 508 F.2d at 1184-85.

Some additional background is helpful in understanding this issue. This circuit has not decided whether discriminatory effect alone is sufficient to establish a prima facie case. *See Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir.1982). The circuits that have addressed the issue have reached different conclusions, the Third and Eighth Circuits hold that proof of discriminatory effect alone is always sufficient to establish a violation of the Fair Housing Act. *Resident Advisory Board*, 564 F.2d at 146-48 ("[w]e conclude that, in Title VIII cases, by analogy to Title Vii cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response"); *Black Jack*, 508 F.2d at 1184-85 ([e]ffect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . 'we now firmly recognize that arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interests the perversity of a willful scheme'")(quoting *Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C.1967) *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C.Cir.1969) (en Banc)). The Fourth and Seventh Circuits require consideration of four factors: (1) the strength of the plaintiff's showing of discriminatory effect, (2) whether there was some evidence of discriminatory intent, (3) what the defendant's interest was in taking the action complained of, and (4) whether

the plaintiff sought to compel the defendant affirmatively to provide housing for minorities or merely to restrain the defendant from interfering with individual property owners who wished to provide such housing. *Smith, 682 F.2d at 1065; Arlington Heights II*, 558 F.2d at 1290. It is not necessary under the Fourth and Seventh Circuits' analysis to demonstrate strong showings as to all four factors. When presented with only two of the four factors pointing toward granting relief, the Seventh Circuit concluded the case was "close" and granted relief, declaring that "we must decide close cases in favor of integrated housing." *Arlington Heights II*, 558 F.2d at 1294.

Because this circuit to date has not established the standard necessary for a prima facie case, the district court in this case evaluated the evidence under both the Third/Eighth Circuit test and the Fourth/Seventh Circuit test. The court found Hawthorne liable under either test. 618 F.Supp. at 1148-57.

The district court found that Hawthorne's actions clearly had discriminatory effect, therefore meeting the test used by the Third and Eight Circuits. The court examined the 1980 census data, the Johnson survey (Exhibit 44), the plaintiffs' and state intervenors' summary of the Caltrans files (Exhibit 46), and the supplemental defendants' summary of the Caltrans files (Exhibit 214) and concluded that

> [w]ith 1,104 Hawthorne families facing displacement, and at most only 128 units of replenishment housing in the process of construction in Hawthorne, the failure promptly to start construction of the two developments at issue seriously jeopardizes the ability of a large number of minority residents to continue residing in Hawthorne. Thus, the "ultimate effect" of Hawth-

orne's actions, like the immediate effect, is racially discriminatory.

618 F.Supp. at 1151. The court also found that the Fourth and Seventh Circuit's test was met, noting that plaintiffs' failure to provide direct evidence of discriminatory intent did not preclude them from establishing a prima facie case due to plaintiffs' showing that three of the four *Arlington Heights II* elements existed: (1) showing a discriminatory effect, (2) showing that Hawthorne's proffered justifications were pretextual, and thus that Hawthorne had no legitimate interest in taking these action, and (3) showing that the remedy sought was merely to enjoin Hawthorne from interfering with developers wishing to provide housing, not to compel Hawthorne to affirmatively provide housing. 618 F.Supp. at 1148-52.

[18] Hawthorne contends that the district court erred in finding a discriminatory effect because the court used an inappropriate population; current Hawthorne displacees. Hawthorne suggests that the population ought to include all persons eligible to reside in the project-whether or not those individuals reside in Hawthorne and whether or not those individuals are freeway displacees.

However, Hawthorne displacees have priority in rental and the number of current displacee households greatly exceed the number of units available in the proposed projects. Thus, in reality, only these households will have an opportunity to live in the units. The district court's decision to limit consideration of adverse impact to current Hawthorne displacees, therefore, is not an abuse of discretion. *Cf. Piper Aircraft, 741 F.2d at 930.*

[19] The evidence presented shows that Hawthorne's refusal to permit construction of the project had a greater adverse impact on minorities. Of the persons who would benefit from the state- assisted housing because

they are low-income displacees, two- thirds are minorities. The failure to build the projects had twice the adverse impact on minorities as it had on whites. *See* 618 F.Supp. at 1150. This showing established a racially discriminatory effect. *See Smith*, 682 F.2d at 1061. The situation is similar to that in *Arlington Heights II*, where the court pointed out that because "a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidizing housing,"the Village's refusal to permit construction of a low- income housing project had a racially discriminatory effect. 558 F.2d at 1288.

[20] Hawthorne then contends that the district court erred in finding its proffered justifications pretextual. Hawthorne argued to the district court that its restriction were justified in the interest of dispersing low-income tenants, preventing school overcrowding, and controlling traffic. The district court rejected each of these justifications, as do we.

Hawthorne justifies its 35 percent cap on low-income tenants as part of a policy of dispersing low-income tenants. However, Hawthorne has not imposed such a cap on any other developments. The district court did not err in concluding that dispersion was a pretextual reason for imposing the low-income quota.

Hawthorne also attempts to justify its denial of the Kornblum project's application on the grounds of preventing school overcrowding. However, Hawthorne approved at least one other development in the area even though such development concededly would have an impact on the schools. The fact that a large number of the proposed alternate sites are located on the very same school attendance zones at the Kornblum development cuts against Hawthorne's justifications. Any development

would inevitably increase the number of students in the attendance zone.

Hawthorne also attempts to justify the denial of the Kornblum application based on the increased traffic. However, Hawthorne presented no studies or other evidence indicating that traffic would increase unacceptably or presenting comparative traffic flows if the site were developed in another way.

Hawthorne further attempted to justify its denial based on excessive housing density. However, Hawthorne presented no evidence on the issue of the density of the surrounding areas, and the evidence shows that it continued to give approval to the construction of other developments in the area after turning down the Kornblum Development, Additionally, as the Planning Department noted, the density of the project itself was less than that allowed under zoning regulations and was "a good example of medium density development that adequately mitigates the overpowering mass of typical two and three story developments in the area."

Hawthorne's final proffered justification is that 52 alternate parcels existed within the City, and therefore its refusal to permit the Kornblum project could not have been discriminatory. Hawthorne essentially argues that it need only identify sites where some development could occur and that the alternate sites be suitable for the project in its present size and design and be available without undue delay.

Here, the State Housing Authority and the developer presented evidence that the proposed development could not be built on any of the alternate sites without undue delay. For Hawthorne to satisfy its burden of showing the availability and suitability of alternate parcels for the proposed projects, the court could reasonably assess the sites' suitability based on whether the developments could

be built without undue delay. The court, therefore did not err in determining that Hawthorne failed to present suitable alternate sites.

Accordingly, we conclude that plaintiffs have not shown any reason for reversing the district court's holding that Hawthorne violated the Fair Housing Act.

F. California Government Code §65008

Hawthorne also contends the district court erred in holding that Hawthorne violated California Government code §65008. Section 65008 prohibits discrimination in housing on the basis of, among other things, race or income. *See* note 1. The district court held that Hawthorne had violated both section 65008(b) and section 65008(c).

1. *Discrimination Based on Race*

[21] Subsection (b) of section 65008 prohibits discrimination against individuals or residential developments on the basis of race. There is no California case law regarding the proof necessary to establish a violation under this section. Because the California Supreme Court has not interpreted Cal.Gov't Code §65008, we must make a reasonable determination as to the result the state's highest court would reach if it were to decide the case. *See Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir.), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30,87 L.Ed2d 706 (1985). Only two California appellate courts have referred to section 65008. *See Davis v. City of Berkeley*, 238 Cal. Rptr. 730 (Cal.App.1987), *review granted in part*, 744 P.2d 654, 241 Cal.Rptr. 460 (1987); *Bruce v. City of Alameda*, 166 Cal.App3d 18, 212 Cal.Rptr. 304 (1985).

The California provision appears to serve the same purpose and contains similar language to the federal Fair Housing Act. Both 42 U.S. §3604 and Cal.Gov't Code §65008(a) use the phrase "because of race" in describing the prohibited type of housing discrimination. Therefore, it is reasonable to conclude that the proof necessary to establish race discrimination under both statutes is the same. *See Molsbergen*, 757 F.2d at 1020 (where state courts have not determined state law, federal court must make reasonable interpretation thereof). By proving a claim under the Fair Housing Act, plaintiffs also establish a violation of section 65008(b).

2. *Discrimination Based on Income*

[22] Subsection (c) of section 65008 prohibits discrimination against individuals or housing developments based on the residents' low or moderate income status. The California Supreme Court has not specified the standard of proof necessary to establish income-based discrimination under section 65008(c). The California Supreme Court has held that to show discrimination based on wealth which violates the California Constitution, a plaintiff need not show discriminatory intent. *Serrano v. Priest*, 5 Cal.3d 584, 602-03, 487 P.2d 1241, 1253-54, 96 Cal.Rptr. 601, 613-14 (1971), *appeal after remand*, 18 Cal.3d 728, 557 P.2d 929, 135 Cal.Rptr. 345 (1976), *cert. denied*, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed2d 1079 (1977). Thus, it seems reasonable to assume that, because discriminatory intent is unnecessary under the constitutional standard, California courts would hold that such a showing is also unnecessary to prove a violation of section 65008(c).

[23] The district court's factual determination that Hawthorne's denial of the Kornblum applications adversely affected low-income individuals is not clearly

erroneous. Most of the Hawthorne residents who will be displaced by the Century Freeway are from low-income households. The record shows that there is insufficient existing or planned low-income housing in Hawthorne to house the displacees. Unless more low-income housing becomes available in Hawthorne, many of these displacees will have to leave Hawthorne in order to find affordable housing. Hence, by preventing the Kornblum project's construction, Hawthorne displacees are deprived of a potential opportunity to remain in the City. The record shows that there is no deficit of moderate or high income housing in Hawthorne . Moreover, few of the Century Freeway displacees are in the higher income brackets. The City's denial of the Kornblum applications, therefore, would have little, if any, effect on wealthier individuals. Because the City's actions adversely affected only low-income persons, the district court correctly concluded that Hawthorne's denial of the applications violated section 65008(c).

G. Attorney's Fees

Hawthorne contends that the district court erred in awarding plaintiffs $175,316.60 in attorney's fees and $6,641.29 in out- of-pocket expenses under 42 U.S.C. §3612(c) and Cal.Code Civ.Proc.§1021.5.

[24] Under 42 U.S.C. §3621(c), a court may award costs and reasonable attorney's fees to plaintiffs who prevail in a Fair Housing Act claim and who are financially unable to assume their own attorney's fees and costs. *See Samuel v. Benedict*, 573 F.2d 580, 581-82 (9th Cir.1978); *Fountila V. Carter, 571 F.2d 487, 495 (9th Cir.1978). Here, the district court determined that because Keith successfully litigated his Fair Housing Act claim, he was entitled to attorney's fees and costs pursuant to section 3612(c). 644 F.Supp. at 1320. The court also found that,*

because two of the named plaintiffs had an annual family income of $12,000 and the third plaintiff's annual income was $14,000, they were financially unable to assume legal fees exceeding $103,000. Hawthorne does not challenge the district court's finding with respect to plaintiffs' ability to assume their own costs and attorney's fees. Rather, it limits its argument to an assertion that the district court erred in its judgment on the merits, and hence plaintiffs are not prevailing parties within the meaning of section 3612(c).

Since we find the court's judgment on the merits was correct, Keith is a "prevailing party" within the meaning of the statute. *See Samuel,* 573 F.2d at 582. Therefore, he is entitled to the attorney's fees award.

[25] The district court also awarded Keith attorney's fees and costs under Cal.Code Civ.Proc §1021.5. This section, which codifies the private attorney general doctrine, permits an award of attorney's fees to a successful party when (1) the litigation enforced an important right affecting the public interest, (2) a significant benefit was conferred on a large class of persons, and (3) the necessity and financial burden are such that an award of attorney's fees is appropriate. *See Woodland Hills Residents Association, Inc. v. City Council,* 23 Cal.3d 917, 933-34, 593 P.2d 200, 208, 154 Cal.Rptr. 503, 511- 12 (1979); *Sundance v. Municipal Court,* 192 Cal.App.3d 268, 237 Cal.Rptr. 269, 271 (1987).

Here by successfully litigating his state law claims, Keith enforced his right to be free from discrimination based on race and income. These rights are "important" rights affecting the public interest. *See Woodland Hills,* 23 Cal.3d at 935- 36, 593 P.2d at 209-10, 154 Cal.Rptr. at 512-13 (private attorney general doctrine is proper in litigation involving race discrimination); *Bruce,* 166 Cal.App.3d at 22, 212 Cal.Rptr. at 307 (locally unrestricted low-cost housing is a matter of vital state

concern). Hence, Keith has satisfied the first requirement under section 1021.5.

By requiring Hawthorne to permit construction of the two developments, Keith enabled a large number of Hawthorne displacees to find affordable housing. He also saved the state both time and money by alleviating the state's need to find alternative housing arrangements for freeway displacees excluded from the Kornblum project. Accordingly, Keith conferred a substantial benefit on a large number of people, and thus satisfied the second requirement of section 1021.5.

Finally, as the district court found, no governmental agency was willing to protect Keith's rights under Cal.Gov't Code §65008. 644 F.Supp. at 1321. Thus, to vindicate his rights, Keith had to bring the suit personally. The court also found that, because Keith's potential gain from the suit was merely the prospect of securing affordable housing, the litigation costs exceeded his personal stake in the outcome. *Id.* Accordingly, both the necessity and financial burden of Keith's suit made the award of attorney fees appropriate. *See Beach Colony II v. California Coastal Commission*, 166 Cal.App.3d 106, 112-15, 212 Cal.Rptr. 485, 490-91 (1985). Thus, Keith met the third condition of section 1021.5.

Because Keith met each of the three requirements of section 1021.5, the district court did not abuse its discretion in awarding attorney's fees and costs pursuant to that section.

AFFIRMED.

NORRIS, Circuit Judge, dissenting:

1.

This action was initiated in 1972 against various federal and state agencies and officials responsible for funding and constructing the Century Freeway in Los Angeles County. The complaint sought to assure protection of the environment and to guarantee the availability of replacement housing for persons displaced by the freeway on a nondiscriminatory basis.[1] In the claims that are relevant to this appeal, plaintiffs charged federal and state defendants with violating federal statutes protecting homeowners, tenants and businessmen who would be forced to relocate because of the construction of highways funded with federal aid.[2]

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[1] Specifically, plaintiffs claimed that defendant federal and state agencies and officials had failed to comply with the procedural requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4347, and its California counterpart, the Environmental Quality Act of 1970 (CEQA), Cal.Pub.Res.Code §§21000-21151.

Plaintiffs claimed that the federal defendants violated section 102(c) of NEPA, 42 U.S.C. §4332(2)(c), which requires federal agencies to prepare environmental impact statements for legislation and "other major Federal actions significantly affecting the quality of the human environment. . . ."

Plaintiffs claimed that state defendants violated section 21100 of CEQA, which requires all state agencies to prepare a detailed statement analyzing the environmental impact of any "project they propose to carry out which could have a significant effect on the environmental of the state."

[2] Plaintiffs claimed that defendant Federal Highway Administration [FHWA] violated various provisions of the Uniform Relocation Assistance and Real Property Act of 1970, 42 U.S.C. §§4601-4655, which prevents the FHWA from funding construction of any highway that will cause displacement of persons living in the highway corridor unless FHWA has received from the state highway authorities "satisfactory assurances"; (1) that "fair and reasonable relocation" payments for moving expenses and for "replacement

The City (the "City") of Hawthorne was not named as a defendant in the original complaint, nor could it have been. As a municipality, the City had no responsibility for funding or building the freeway. Shortly after the initial complaint was filed, the City voluntarily became a *plaintiff* in the action, thereby committing its resources to assist the NAACP and the other plaintiffs in prosecuting the case.

Years after a preliminary injunction was issued halting all work on the freeway, the parties entered into a consent decree which was approved by the district court on September 22, 1981. The stated goal of the consent decree is "to provide for the housing needs of those living in the area of the proposed path of the freeway." Excerpt of Record (ER) at 3. In order to accomplish this goal, the consent decree adopts a Housing Plan which requires the state and federal defendants to make 3,700 units of housing available to help house the 21,000 persons who would be displaced by the freeway. The decree requires that 55 percent of the replacement units be affordable to low-income households and 25 percent be affordable to moderate-income households. The consent decree imposes no obligation on the City, the NAACP, or any other plaintiff to provide replacement housing, to provide funding for replacement housing or to assist the

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housing" will be provided to persons who must relocate; (2) that "relocation assistance programs" will be provided for such displaced persons; and (3) that "within a reasonable period of time prior to displacement there will be available" adequate replacement housing. 42 U.S.C. §4630 (1983).

In addition to these claims, plaintiffs claimed that state defendants violated section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), which required them to hold public hearings to consider the economic effects of constructing a freeway at the proposed location.

defendant state and federal agencies in performing their obligations to provide replacement housing.

The consent decree designates the California Department of Housing and Community Redevelopment (HCD) as the agency responsible for administering the Housing Plan. Using funds provided by the federal and state defendants, HCD contracted with private developers to build housing units which would be offered (for sale or rental) on a priority basis to households displaced by the freeway.

This appeal arises out of an agreement between HCD and a developer for the construction of a 96-unit apartment complex in Hawthorne known as the Kornblum project. The Kornblum developer's applications for a building permit, a lot split, a zoning change, and a site development permit were denied by the Hawthorne City Council.[3]

Following the rejection of the Kornblum project, plaintiffs filed a supplemental complaint against the City which is the subject of this appeal. The gravamen of the supplemental complaint is that in turning down the Kornblum project the City violated various state and federal laws which prohibit discrimination against minorities and low-income households. Specifically, the supplemental complaint alleged that the City violated the federal Fair Housing Act, 42 U.S.C. §3601 *et seq.*, which

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[3] The majority recites that the Council voted to deny the applications after some local residents expressed opposition to low-income families in their neighborhoods and voiced concerns about increased crime and traffic. Opinion at 472. That some residents expressed such concerns is irrelevant to this appeal. City authorities routinely consider the impact of a proposed development project on traffic density, crime, and schools in deciding whether to approve it. What is relevant is that the district court expressly found that the City Council did not act with discriminatory intent. ER at 99.

guarantees equal opportunity in housing without regard to race or color. The City was also charged with violating Cal.Gov't Code §65008, which prohibits discrimination in housing on the basis of race, color, or low- income status. Next, the plaintiffs claimed that the City violated Cal.Gov't Code §65583 by failing to adequately take account of the Century Freeway displacement in devising its local Housing Element.[4] Finally, the supplemental complaint claimed violations of the federal and state constitutions. On April. 15, 1985, the district court granted plaintiffs' motion for leave to file the supplemental complaint under Federal Rule of Civil Procedure 15(d).

II

Rule 15(d),[5] which permits supplemental pleadings, focuses on events which have occurred after the date of the original pleading. Thus, a supplemental pleading is

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[4] A Housing Element is one part of a general plan local governments are required to prepare under California law. The Housing Element "shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing..." Cal.Pub.Res.Code §65583 (West 1983)

[5] Rule 15(d) provides:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

If leave to file a supplemental pleading is not granted, the moving party is free to commence a new and independent action.

one designed to bring earlier pleading is one designed to bring earlier pleadings up to date. *See generally,* 6. C. Wright & A. Miller, *Federal Practice and Procedure; Civil* §1510 (1971).

In this appeal the City argues that the district court abused its discretion in granting some plaintiffs leave to file a supplemental complaint against a co-plaintiff because there is absolutely no connection in law or fact between the issues framed by the original complaint and the issues framed by the supplemental complaint. The City argues that the supplemental complaint pleads a "new and distinct" case, and that the original and supplemental pleadings neither "arise out of the same transaction or occurrence" nor involve "common questions of law or fact." Opinion at 474.

A

The majority characterizes the City's position as advocating a transactional test for Rule 15(d), a test the majority rejects. Opinion at 474. In turn, however, the majority reaches a result it obviously deems desirable-it affirms the district court's exercise of discretion in permitting the supplemental complaint- but it leaves us in the dark as to the standards which govern a district court's discretion to permit supplemental pleadings under Rule 15(d).[6]

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[6] The final two sentences of the majority's discussion of the supplemental complaint issue read: "All involved-plaintiffs, defendants, and district court-were familiar with the underlying action. *Thus,* we hold that the district court did not abuse its discretion in permitting the supplemental complaint." Opinion at 477 (emphasis added). I cannot believe that the majority intends to suggest that *familiarity* with the lawsuit should be the standard by which to limit Rule 15(d) discretion.

The majority acknowledges, as it surely must, that "some relationship must exist between the newly alleged matters and the subject of the original action." Opinion at 474. But the majority fails to give us any clue as to what the nature of that relationship must be. As best I can determine, the majority adopts a "concern" test: The supplemental complaint was permitted because "[t]he concern in the original action, the consent decree, and the supplemental complaint is the same — availability of replacement housing for persons displaced by the Century Freeway." Opinion at 474. I respectfully submit such a "concern" test is meaningless for the purpose of determining whether a sufficient nexus exists between original and supplemental pleadings to satisfy Rule 15(d). The fact that plaintiffs are motivated by the laudable goal of affordable replacement housing for freeway displacees establishes no nexus that could possibly satisfy the requirements of Rule 15(d).

The concerns of plaintiffs are not the concerns of Rule 15(d). As the majority recognizes, "Rule 15(d) is a tool of judicial economy and convenience." Opinion at 473. However, the majority fails to make any showing that *permitting the supplemental complaint in this case serves either of these goals.* In order to satisfy Rule 15(d), surely there must be some articulable reason to believe the two pleadings are connected; there must be some nexus. Neither the district court nor the majority has identified any such connection in this case because none exists. To put it quite simply, there is nothing to link the original and supplemental pleadings in this case.

B

The district court, at least, recognized the importance of identifying some nexus between the two pleadings, and attempted to find legal questions that are common to the

original and supplemental complaints. The closest the district court came to identifying a common question of law was its vague assertion that the supplemental complaint "basically concerns an interpretation of the replenishment housing provisions of the Consent Decree." ER at 151. The district court, however, failed to specify a single issue of interpretation of the consent decree common to the two pleadings. In fact, the district court's assertion is not grounded in reality. As noted above, the consent decree imposes no obligations on municipalities in general nor the City of Hawthorne in particular. Indeed, to the extent that the consent decree even touches on the rights or responsibilities of Hawthorne or other municipalities, it does so in order to emphasize that the "replacement units [mandated by the decree] shall be relocated or reconstructed so as to be in conformity with applicable zoning, subdivision and building code laws."ER at 30. In sum, there is no basis for the assertion that a denial of leave to file the supplemental complaint could lead to "the possibility of another court rendering and interpretation of the Consent Decree . . . " ER at 151.

The majority is no more successful than the district court in identifying common issues of law. After stating that "a focal point of the original proceedings was the provision of adequate replacement housing," and that "district court's published order devoted nearly five full pages to the issue of the availability of replacement housing,"Opinion at 474, the majority concludes that the "concern" for replacement housing is present in both claims. Conspicuously missing is any explanation of how this "concern" translates into any common legal questions the adjudication of which in the same lawsuit would be judicially economical or convenient, especially since the issues raised by the original complaint have already been resolved in the form of the consent decree.

This failure on the part of the district court and the majority is not hard to understand. To my mind, the issues of law raised by the two pleadings are totally different. The federal and state statutory and constitutional provision relied upon in the supplemental complaint against the City of Hawthorne as defendant bear no relationship to the legal questions arising out of the original complaint naming as defendants state and federal officials and agencies responsible for funding and building the Century Freeway.[7] The laws relied upon in the supplemental complaint prohibit government from discriminating against *all* minorities and poor people. Whether the victims of the alleged discrimination happen to have been displaced by a freeway is irrelevant to the questions whether the City, in rejecting the Kornblum project, unlawfully discriminated against minorities or low-income households. To put it differently, whether persons displaced by the Century freeway would occupy the Kornblum project if built is simply extraneous to the claims made against the City in the supplemental complaint. Those claims rest upon laws which prohibit cities from discriminating invidiously in their housing policies no matter where the prospective tenants or owners come from. What *is* relevant to the discrimination claims in the supplemental complaint is whether the Kornblum units would be occupied by minority or low-income persons, regardless of where these persons had previously lived.

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[7] The sixth claim in the supplemental pleading arguably *relates* at least tangentially to the Century Freeway, defendant Hawthorne violated Cal.Gov.Code §65883, which deals with housing plans that municipalities must promulgate. What is crucial, however, is that there are no questions of law common to section 65883 and the statutory and constitutional provisions relied upon in the original complaint.

Another way to look at it is to examine the classes of persons who are protected by the laws relied upon in the two pleadings. The class of persons protected by the laws relied upon in the two pleadings. The class of persons protected by the laws relied upon in the supplemental complaint-i.e., persons of low-income or minority status-is distinct from the class of persons who are protected by the laws relied upon in the original complaint-*i.e.*,persons displaced by the Century Freeway. The fact that there is some overlap between the classes does not in itself create common legal questions. Suppose, foe example, freeway displacees as a class sued, on a third-party beneficially theory, an independent contractor hired by the HCD, claiming that the contractor had defectively built housing units which were to be occupied by displacees. Surely, such a claim would raise "concerns" about the adequacy of replacement housing mandated by the consent decree. Under the standardless approach taken by the majority, a supplemental complaint based on such a contractual theory could not be distinguished on any principled basis from the supplemental complaint at issue in this appeal.

C

Just as the district court and the majority have failed to identify a single issue of law common to the original and supplemental complaints, each has failed to identify a single issue of fact common to the two pleadings. The district court noted generally, without specific example, that "[s]ome allegations asserted in the supplemental complaint are similar to those raised in the underlying action, for example, violations of state and federal anti-discrimination statutes." ER at 151-52. As discussed above, however, the statutory provisions relied upon in the original complaint are different and speak to entirely different problems, and protect an entirely different class

of persons, than the statutes relied upon in the supplemental complaint. It is also telling that the majority makes no attempt to identify a single issue of fact which is common to the two pleadings.

This failure by the district court and the majority makes no attempt to identify a single issue of fact which is common to the two pleadings.

This failure by the district court and the majority to identify common questions of fact is also unsurprising. The operative facts in the supplemental complaint bear no relationship to the operative facts in the original complaint. Indeed, the claims raised by the supplemental complaint could be adjudicated without a single reference to the consent decree which settled the claims raised in the original complaint. In sum, just as there are no common questions of law, there are no common questions of fact linking the two pleadings.

D

The case law provides no support for the majority's standardless application of Rule 15(d). In *Griffin v. County School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964), a supplemental complaint was filed in response to an attempt by the legislature of Virginia to cut off funds for public schools after the district court ordered a local school board to desegregate the public schools. The Supreme Court upheld a supplemental complaint against the legislature because the supplemental complaint did not plead "a new cause of action, but [was] merely part of the same old cause of action arising out of the continued desire of colored students in Prince Edward County to have the same opportunity for state-supported education afforded to white people." *Griffin*, 377 U.S. at 226, 84 S.Ct. at 1231. Thus, the injury to the minority schoolchildren *resulted from the breach of a duty*

to provide public education on a desegregated basis-a duty that was shared by state and local officials. Here, the duty of state and federal officials and agencies to provide replacement housing for freeway displacees is not shared by the City of Hawthorne. Moreover, the protected class in *Griffin* remained the same; here, as noted above, the classes protected by the statutes relied upon in the two pleadings are different. For these reasons, *Griffin* provides no support for the majority's position.

The majority's reliance on *United States ex rel. Atkins v. Reiten*, 313 F.2d 673 (9th Cir.1963), is similarly misplaced. In *Reiten*, a materialman brought suit on a payment bond pursuant to the Miller Act, 40 U.S.C. § 270a(a)(2), to receive payment for material furnished to a government contractor. The district court dismissed the initial complaint, which was filed less than 90 days after the last material had been furnished to the contractor, because Miller Act provides a cause of action for payment only after 90 days have passed. Our court upheld district court's exercise of discretion in permitting a supplemental complaint filed by the materialman after 90 days had passed. In *Reiten*, the underlying factual and legal issues framed by the initial and supplemental complaints were identical. The plaintiff materialman had only on right-that conferred to him by the Miller Act-to recover on the payment bond. The elements of the plaintiff's case did not vary under the original and supplemental pleadings; first, he had to prove he had entered into a contract with the government contractor; second he had to prove that he had furnished the materials; third, he had to show he had not been paid in full; finally, he had to prove that 90 days had passed since he delivered the materials. The original complaint was dismissed only because the materialman had failed to satisfy the 90-day requirement. It is unremarkable, then, that our court allowed him to update his lawsuit by

pleading intervening facts-that 90 days had passed-under Rule 15(d).[8]

By contrast, the issues framed by the supplemental pleading involved in this appeal are distinct from, and involve different legal and factual questions than, the issues framed by the original complaint. Because plaintiffs here are not merely updating a lawsuit to vindicate a single right, but rather are trying to use Rule 15(d) as a vehicle for expanding the original case into a new action against a co-plaintiff on totally un- related claims, the cases relied upon by the majority fail to support its construction of Rule 15(d).[9]

E

The majority reading of Rule 15(d) also creates tension between Rule 15(d) and other Federal Rules of Civil Procedure. Rule 13(g), for example, deals explicitly with cross-claims by one plaintiff against another. Rule 13(g), however, like Rule 13(a) governing compulsory counterclaims, requires that the cross-claim arise out of the same "transaction or occurrence" as the original claim, a

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[8] Nor does *H.F.G. Co. v. Pioneer Publishing Co.*, 7 F.R.D. 654 (N.D.Ill.1947), which the majority cites, support the majority's argument. In permitting a Rule 15(d) supplemental complaint in a derivative action to recover monies allegedly embezzled by the company president, the district court in *H.F.G.* explicitly focused on the common factual questions that would make it more judicially economical to try the different causes of action together. 7. F.R.D. at 656.

[9] The majority also cites a number of cases which stand for the general proposition that a district court is afforded a great deal of discretion in deciding whether to permit a supplemental pleading. Opinion at 474-475. To say there is discretion, however, is to say nothing about the appropriate standards for determining the limits on that discretion.

claim, a standard the majority expressly rejects when construing Rule 15(d). Opinion at 474. It strikes me as anomalous to allow a plaintiff to circumvent the "transaction or occurrence" requirement of Rule 13(g) by recharacterizing a cross-claim against a co-plaintiff as a supplemental complaint under Rule 15(d). And yet this is precisely what the majority does in this case.[10]

CONCLUSION

I dissent in this case even though I applaud the consent decree's worthy goal of providing affordable housing for persons who are displaced by the Century Freeway. To me, however, this appeal is not about housing; this appeal is about the limits on official power-specifically, judicial power. In pursuit of the laudable goal of housing for freeway displacees, the district court and the majority have failed to justify the supplemental complaint in this case on any principled basis. They leave me no choice but to dissent.

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[10] *See also* Federal Rule of Civil Procedure 20(a), which in pertinent part provides: ". . . All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. . . ."

APPENDIX C

FILED
JAN 24 1989
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

APPENDIX C

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH W. KEITH, et al.	)	
	)	No. 85-6336
Plaintiffs-Appellees,	)	
	)	D.C. #CV 72-355-HP
vs.	)	(Central California)
	)	
JOHN A. VOLPE,	)	
as Secretary of	)	
Transportation, et al.,	)	ORDER
	)	
Defendants.	)	
	)	

EARL WRIGHT, et al.,	)
	)
Plaintiffs/Appellees on Supplemental Complaint,	)
	)
CALIFORNIA DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT, et al.,	)
	)
Intervenors/Appellees on Supplemental Complaint,	)
	)
vs.	)
	)
CITY OF HAWTHORNE, et al.,	)
	)
Defendants/Appellants on Supplemental Complaint.	)
	)

Before: SCHROEDER, NELSON, and NORRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and a majority of active judges did not vote to accept the suggestion for rehearing en banc. Fed.R.App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on April 24, 1989, I served the within *WPetition for Writ of Certiorari to the Supreme Court of the United States, October Term, 1988* in said action or proceeding by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)